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Arbitration Study Preliminary Results

Section 1028(a) Study Results To Date



Consumer Financial
Protection Bureau

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1. Introduction

In section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress instructs the Consumer Financial Protection Bureau (the “Bureau”) to study the use of pre-dispute arbitration contract provisions in connection with the offering or providing of consumer financial products or services, and to provide a report to Congress on the same topic. The Bureau is in the process of conducting that study. This document presents preliminary results reached in the Bureau’s study to date. These results are subject to revision when the Bureau submits its statutorily-mandated report to Congress if further analysis so warrants. Furthermore, the Bureau’s report to Congress will contain additional analyses that the Bureau is planning to conduct but for which the Bureau does not yet have even preliminary results. A concluding section identifies work that the Bureau may or expects to cover in later stages of its study that will also inform its report to Congress.

1.1 What is a pre-dispute arbitration clause?

Companies provide almost all consumer financial products and services subject to the terms of a written contract.¹ Whenever a consumer obtains a consumer financial product such as a credit card, a checking account, or a payday loan, he or she typically receives the company’s standard-form, written legal contract.

In addition to being governed by such contracts, the relationship between a consumer and a financial service provider will generally be governed by one or more federal consumer protection

¹ Section 1002(5) of the Dodd-Frank Act defines “consumer financial product[s] or service[s].” *See* 12 U.S.C. § 5481(5).

laws and often by state consumer protection laws. These laws create legal rights for consumers and impose duties on financial service providers. Absent an agreement to the contrary, if a dispute arises between a consumer and a company as to whether one side or the other is adhering to its contractual or statutory duties, the aggrieved party generally has the right to seek resolution of the dispute in a court of law (although some state and federal laws provide only for public, and not private enforcement). Furthermore, the federal court system and most state court systems provide for a class action process in which, in defined circumstances, one or more plaintiffs may file suit on behalf of similarly-situated individuals. If such an action is certified by the court as meeting the criteria for a class action and plaintiffs prevail or secure a settlement, all members of the class—for example, customers of a company who have been adversely affected by a particular practice—may be eligible to obtain relief without initiating their own lawsuits. Conversely, if the defendant prevails in a certified class action, all members of the class may be bound by the decision and thereby precluded from initiating their own lawsuits with respect to the claims at issue in the class case.

As a general rule, the parties to a contract can agree to an alternative means of resolving any disputes that arise between the parties, including both contractual disputes and disputes under state or federal law. The most common form of alternative dispute resolution is final and binding arbitration in which a privately-appointed individual—an arbitrator—is empowered to resolve claims that arise between the parties.²

As discussed in detail in section 3, contract clauses that provide for pre-dispute arbitration appear to be a common, but not a universal, feature of consumer financial contracts. These arbitration clauses are sometimes described as “mandatory.” Under the terms of such agreements, either side can mandate that a dispute that arises between the parties be resolved in binding arbitration.³ The clauses are described as “pre-dispute” because they commit the parties to this arrangement before there is a dispute between them.

² In some cases, more than one arbitrator may be involved in resolving a dispute.

³ Alternatively, the term “mandatory,” when used to describe arbitration clauses in the consumer context, may derive from the nature of consumer contracts. When a consumer uses a consumer financial product, he or she is usually bound by the terms of a consumer contract. The terms of that contract are not generally open to negotiation by the consumer, but are instead offered on a take-it-or-leave-it basis, meaning that the consumer either accepts those terms or instead shops for another product with different standard-form terms. In legal terms, the contract is one of

These arbitration clauses generally give each party to the contract two distinct contractual rights. First, either side can file claims against the other in arbitration and obtain a binding decision from the arbitrator. Second, if one side sues the other in court, the party that has been sued in court can invoke the arbitration clause to require that the party that went to court instead proceed, if at all, in arbitration.

Arbitration clauses almost always specify the private arbitration organization that will administer the dispute if and when the clause is invoked by the consumer or the company. The American Arbitration Association (or “AAA”) is one such “arbitration administrator”; JAMS, Inc. is another. For the consumer financial contracts we have reviewed to date, our research shows that the AAA is the most commonly specified organization in such pre-dispute arbitration clauses. We review certain AAA data in section 4 below.⁴

Arbitration clauses may have a number of other features that address where disputes may be adjudicated, the timing for filing disputes, and the remedies that may be awarded. Additionally, arbitration clauses may include limitations on the use of class proceedings and “carve-outs” for small claims court proceedings.⁵

Pre-dispute arbitration has become a contentious legal and policy issue. Following a series of Supreme Court cases interpreting the 1925 Federal Arbitration Act (the “FAA”), courts regularly enforce pre-dispute arbitration clauses in consumer, employment, and other contexts in which the relevant contract is not subject to negotiation between the contracting parties.⁶ At least from

adhesion, making the clause “mandatory” in contrast to the voluntary clauses that may be reached by negotiation between commercial parties. *See, e.g.*, Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1632 n.1 (2005). Other scholars argue that the term “mandatory arbitration” may be better reserved for arbitration that is mandated by statute or regulation. *See, e.g.*, Ian R. Macneil et al., FEDERAL ARBITRATION LAW § 17.1.2.2, at 17:8-17:9 (Supp. 1999).

⁴ The AAA is a non-profit organization. It was founded in 1926, following enactment of the Federal Arbitration Act, with the specific goal of helping to implement arbitration as an out-of-court solution to resolving disputes. It describes itself as being dedicated to “the development and widespread use of prompt, effective and economical methods of dispute resolution.” Its mission statement and other information are available at the AAA’s website, www.adr.org.

⁵ We discuss these two features at sections 3.4.2 and 3.4.5.

⁶ Chapter 1 of the FAA is codified at 9 U.S.C. §§ 1-16. It provides that an arbitration award is final and binding, with limited grounds available for judicial review. *See* 9 U.S.C. §§ 9-10. There has been an active scholarly and judicial debate over the meaning of the FAA, particularly as it applies to consumer contracts and state court proceedings. *See*

the late 1990s, the inclusion of arbitration clauses in consumer financial contracts appears to have become more common.⁷ In 2011, the Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*.⁸ In that case, the Court held that the FAA preempted state law that would have prohibited the enforcement of a consumer arbitration clause with a “no-class” provision. Prior to that decision, courts were divided on state law challenges to the enforceability of no-class provisions in arbitration clauses.

Some commenters take the view that pre-dispute arbitration clauses contained in standard-form contracts are unfair to consumers. Critics generally focus on three areas. First, they attack arbitration as a dispute resolution process. They contend that it reduces or eliminates procedural protections—such as a right of appeal or access to discovery—that are generally available in court.⁹ There are also claims that arbitration may be biased against consumers, and that it may not be as fast or cheap as its proponents claim.¹⁰ Second, especially in the wake of the Supreme Court’s decision in *Concepcion*, critics argue that arbitration clauses may immunize companies from a range of private civil liabilities, such as by reducing the availability of discovery or by eliminating class proceedings.¹¹ According to this argument, arbitration clauses may undermine deterrence and leave widespread wrongdoing against consumers unaddressed. Finally, critics assert that arbitration, which is almost always conducted in private, undermines

David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 541-630 (2004); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 393-440 (2004).

⁷ For example, a number of large credit card issuers moved to include arbitration clauses in their consumer credit card contracts from the late 1990s. The reasons for this shift are contested and the focus of a court case, *Ross v. Bank of America et al.*, 05-Civ. 7116, which is pending in the United States District Court for the Southern District of New York. We discuss the *Ross* case further in section 3. The detailed timeline for adoption by credit card issuers is discussed, *inter alia*, in the report of the *Ross* defendants’ expert, Professor Kenneth G. Elzinga, dated September 21, 2010. The timeline of adoption for other products may differ, of course, and adoption has not been universal, as we discuss in section 3.2.

⁸ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

⁹ See, e.g., National Association of Consumer Advocates (“NACA”) and National Consumer Law Center (“NCLC”) RFI Comment at 5.

¹⁰ See, e.g., Americans for Financial Reform (“AFR”) RFI Comment at 5.

¹¹ See, e.g., Public Justice RFI Comment at 4.

benefits inherent in the public nature of the court system, such as transparency and the development of clear precedents.¹²

In contrast, defenders of pre-dispute arbitration clauses take the view that arbitration offers “a faster, more efficient and more cost-effective method of resolving disputes than court litigation.”¹³ According to this point of view, arbitration “minimizes the disruption and loss of good will that often results from litigation and ... reduces litigation costs.”¹⁴ Arbitration proponents also claim that these cost savings inure to the benefit of consumers through lower prices and/or expanded access.¹⁵ Finally, while proponents of arbitration clauses may acknowledge the potential impact on class proceedings, many take the view that such proceedings typically are meritless, inefficient, and provide little or no benefit to consumers.¹⁶ They contend that the reduced cost of arbitration together with various provisions of arbitration clauses (including the availability of small claims court as well as contingent minimum awards in arbitration) provide ample opportunity for consumers to obtain redress for asserted wrongs that involve relatively small amounts of money.

1.2 The Bureau’s mandate to study consumer arbitration

Section 1028(a) of the Dodd-Frank Act requires the Bureau to “conduct a study of, and . . . provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.” “Covered persons” are defined as “any

¹² See, e.g., NACA & NCLC RFI Comment at 5-6.

¹³ American Bankers Association (“ABA”), Consumer Bankers Association (“CBA”), and The Financial Services Roundtable (“FSR”) RFI Comment at 2.

¹⁴ *Id.*

¹⁵ See, e.g., American Financial Services Association (“AFSA”), RFI Comment at n.30.

¹⁶ See, e.g., ABA/CBA/FSR RFI Comment at 9 n.16.

person that engages in offering or providing a consumer financial product or service.”¹⁷ Because section 1028(a) specifically addresses the use of pre-dispute arbitration clauses in consumer financial contracts, those “agreements”—and the consumer disputes that may be subject to their terms—have been and will remain the focus of the Bureau’s study.

As a preliminary step in undertaking the study, the Bureau published a Request for Information (the “RFI”) in 2012 that sought comments on the appropriate scope, methods, and data sources for the required study.¹⁸ We received 60 comments in response to the RFI. We refer to a number of those comments in this presentation.¹⁹ Most comments came from trade associations, consumer groups, academics, or law firms. We received almost no comments from individual financial institutions that include arbitration clauses in their standard-form contracts with consumers.

1.3 What does this presentation cover?

This presentation includes preliminary results reached in the Bureau’s study to date. As our study effort continues, we will refine and place this work into fuller context. The Bureau is disclosing these preliminary results at this time to provide stakeholders with greater transparency into the work the Bureau has undertaken to date and to provide further detail on the work the Bureau is planning to undertake before issuing its report to Congress.

This presentation has five sections:

- Section 2 is an Executive Summary of the results to date.
- Section 3 addresses our preliminary findings with respect to the incidence of arbitration provisions in the three markets which we have studied thus far: consumer credit card,

¹⁷ 12 U.S.C. § 5481(6)(A).

¹⁸ See Consumer Financial Protection Bureau, Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements 4 (Apr. 2012) (Docket No. CFPB-2012-0017).

¹⁹ We cite to these using the name of the commenter and the title “RFI Comment.” All such RFI Comments are available on www.regulations.gov, accessible from the Bureau’s website, www.consumerfinance.gov.

checking account, and general purpose reloadable prepaid card agreements. It identifies the extent to which these clauses are included in consumer contracts in these three markets. It also reviews the features of these clauses.

- Section 4 provides a typology of consumer disputes filed with the AAA by consumers and/or companies from January 1, 2010 through to the end of 2012 for two of the markets for which we have studied the incidence of arbitration clauses—the credit card and checking account markets—and also in the payday loan market.²⁰ We review several data points, such as the number of filings, the legal claims that they cover, claim amounts, initial fee assessments, whether the parties are represented by counsel, and demographic distributions of consumers in these arbitrations. We may expand our analysis of AAA dispute filings to other consumer financial products in the next phase of our work.
- Section 5 reviews filings in small claims courts by consumers and companies in the credit card marketplace. Many arbitration clauses contain small claims court “carve-outs”—generally enabling either the consumer or the company to use small claims courts, rather than arbitration, for claims resolution. This section reviews available data in the states and largest counties that provide electronic access sufficient for these purposes to see how much use consumers and companies make of small claims court.
- Finally, section 6 describes areas that the Bureau expects to cover in the remainder of its study of pre-dispute arbitration provisions.

Because the Bureau’s work on this study is ongoing, any of the findings presented here may be refined or modified when we issue our report to Congress pursuant to section 1028(a). Furthermore, that report will provide additional context to the preliminary results included here in at least the following four respects.

- This presentation focuses on the “front-end” of formal disputes involving consumers: who files these disputes, in what numbers, against whom, and about what. In later work,

²⁰ We have identified only four prepaid cases in the data we received from the AAA. We have not provided data specific to that market because there are so few of these filed disputes.

we intend to address the “back-end” of formal disputes: what happens, in how long, and at what cost.

- This presentation also focuses on filings in arbitration and in small claims court. Later work will address consumer cases filed in federal courts and in state courts other than small claims courts.²¹ Numerous commenters have said that an informed assessment of arbitration requires some consideration of available alternative forms of formal dispute resolution, especially class and non-class actions in court. We agree.
- This presentation also looks primarily at individual disputes, although it provides some initial data points about the interrelationship between individual and class proceedings. Later work will look further at consumer class actions.
- Finally, this presentation is limited to certain aspects of four specific consumer financial products: consumer credit cards, checking accounts, general purpose reloadable prepaid cards, and payday loans. Later work will cover other aspects of those products, and potentially other consumer financial products as well.

Readers should not interpret this presentation as our assessment, preliminary or otherwise, of the relative importance of different areas to be covered in the statutory report to Congress. Rather, the subjects addressed here are those as to which we already have been able to obtain and analyze sufficient data in order to make some preliminary findings. When the Bureau issues its report to Congress, we intend to cover arbitration and court proceedings, including class actions—at least to the extent that meaningful comparisons can be made. Only once our work reflects that fuller focus, will we submit the report called for by section 1028(a) of the Dodd-Frank Act.

²¹ As noted by several commenters, state court data are not available from electronic sources on a comprehensive basis.

2. Summary of results to date

While our work remains in progress, we have preliminarily reached the following conclusions based on the data that we have reviewed to date:

- In the credit card market, larger bank issuers are more likely to include arbitration clauses than smaller bank issuers and credit unions. As a result, while most issuers do not include such clauses in their consumer credit card contracts, just over 50% of credit card loans outstanding are subject to such clauses. (In 2009 and 2010 several issuers entered into private settlements in which they agreed to remove the arbitration clauses from their credit card consumer contracts for a defined period. If those issuers still included such clauses, some 94% of credit card loans outstanding would now be subject to arbitration.)
- In the checking account market, larger banks tend to include arbitration clauses in their consumer checking contracts, while mid-sized and smaller banks and credit unions do not. We estimate that in the checking account market, which is less concentrated than the credit card market, around 8% of banks, covering 44% of insured deposits, include arbitration clauses in their checking account contracts.
- In our GPR prepaid card sample, for which data are more limited than for our credit and checking account samples, arbitration clauses are included across the market.²² Some 81% of the cards studied, and all of the cards for which market share data are available, have arbitration clauses in their cardholder contracts.

²² “GPR” prepaid cards are general purpose reloadable prepaid cards. *See infra* note 26.

- Nearly all the arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis. Around 90% of the contracts with arbitration clauses—covering close to 100% of credit card loans outstanding, insured deposits, or prepaid card loads subject to arbitration—include such no-class arbitration provisions. Although these terms effectively preclude all class proceedings, in court or in arbitration, some arbitration clauses also expressly waive the consumer’s ability to participate in class actions in court.
- The AAA is the predominant administrator for consumer arbitration about credit cards, checking accounts, and GPR prepaid cards.
- From 2010 through 2012, there was an annual average of 415 individual AAA cases filed for four product markets combined: credit card, checking account, payday loans, and prepaid cards.²³ The annual average was 344 credit card arbitration filings, 24 checking account arbitration filings, 46 payday loan arbitration filings, and one prepaid arbitration filing. These numbers do not indicate the number of cases in which the filing was “perfected”²⁴ and the matter proceeded to arbitration. They indicate only the number of filings, deficient or otherwise.
- Not all these arbitration filings were made by consumers. For the three product markets combined, the standard AAA “claim form” records consumers filing an average of under 300 cases each year.²⁵ The remaining filings are recorded as mutually submitted or made by companies.
- From 2010 through 2012, around half the credit card AAA arbitration filings were debt collection disputes—proceedings initiated by companies to collect debt, initiated by

²³ Over three years, only four of the filings were prepaid cases.

²⁴ The AAA views an arbitration filing as “perfected” when all initial fees have been paid, the clause is deemed sufficient under the Due Process Protocol, the submission complies with the AAA’s debt collection moratorium (if applicable), and the matter is otherwise ready to proceed to arbitration. We discuss the debt collection moratorium in section 4.2.2. The Due Process Protocol is discussed at several places, including sections 4.9, and 5.

²⁵ With prepaid cases included, the average is still under 301 cases each year. The annual average was 235 consumer-filed credit card disputes, 20 consumer-filed checking account disputes, and 44 consumer-filed payday loan disputes.

consumers to challenge the company's claims in court for debt collection, or mutual submissions to the same effect. More than a quarter of these debt collection arbitrations also included non-debt consumer claims. Many of the credit card disputes that we have not formally defined as debt collection arbitrations also include a substantive dispute about the amount of debt owed—or not owed—by the consumer to the company.

- In contrast, very few of the checking account and payday loan AAA arbitration filings from 2010 through 2012 were debt collection arbitrations.
- From 2010 through 2012, a slight majority (53%) of consumers were represented by counsel in the AAA arbitrations that we reviewed for these three product markets. For non-debt collection disputes, 61% of consumers had a lawyer at some point in the arbitration proceeding. For debt collection arbitrations, 42% of consumers had legal representation at some point in the proceeding. Companies were almost always represented by outside or in-house counsel in both debt collection and non-collection arbitrations.
- From 2010 through 2012, almost no AAA arbitration filings for these three product markets had under \$1,000 at issue. This was true for debt collection arbitrations and other arbitrations as well. For these three product markets combined, during the period 2010 through 2012, there were an annual average of seven arbitrations per year filed with the AAA that concerned disputed debt amounts that were at or below \$1,000. For the same products, there were an annual average of under eight AAA arbitrations in which there was no disputed debt amount identified and the affirmative claim amount was at or below \$1,000.
- From 2010 through 2012, for arbitration filings before the AAA involving these three products, the average alleged debt amount in dispute was \$13,418. The median alleged debt amount in dispute was \$8,641. Looking only at filings that did not identify a disputed debt amount, and excluding one high-dollar outlier, the average amount at issue was \$38,726, and the median \$11,805.
- Most arbitration clauses that we reviewed contain small claims court carve-outs. In 2012, consumers in jurisdictions with a combined total population of around 85 million filed fewer than 870 small claims court credit card claims—and most likely far

fewer than that—against issuers representing around 80% of credit card loans outstanding.

- Credit card issuers are significantly more likely to sue consumers in small claims court than the other way around. In the two top-30 counties by population in which small claims court complaints can be directly reviewed by electronic means, there were more than 2,200 suits by issuers against consumers in small claims court and seven suits by consumers against those issuers. (In one of these two counties, companies are not able to or face severe limits to bring collection claims in small claims court, so these numbers reflect company filings in only one of the two counties. The consumer filing numbers, however, are across both counties.)

3. Clause incidence and features

A central aspect of the use of arbitration clauses is their incidence—that is, how often they appear in contracts. This section examines how frequently arbitration clauses appear in three types of consumer financial services contracts: cardholder agreements for credit cards, deposit account agreements for checking accounts, and cardholder agreements for general purpose reloadable (GPR) prepaid cards.²⁶ Next we consider the length and complexity of arbitration clauses relative to the rest of the cardholder agreement. We then look in more detail at provisions included in arbitration clauses, such as whether the clauses permit the consumer to reject the arbitration clause, what arbitration administrators are specified, and whether they preclude class proceedings. Finally, we present data on changes over time in the use of arbitration clauses and selected clause features. We look, in particular, at how clauses have changed since the Supreme Court’s 2011 decision in *Concepcion*.

²⁶ A general purpose reloadable (GPR) prepaid card is a card that “a consumer can use anywhere that accepts payment from a retail electronic payments network, such as Visa, MasterCard, American Express, or Discover” and to which the consumer can add funds after the card is issued. *See* Consumer Financial Protection Bureau, Advance Notice of Proposed Rulemaking, 77 FED. REG. 30,923, 30,923 (May 24, 2012) (Docket No. CFPB-2012-0019). For purposes of this presentation, we limit our analysis to GPR prepaid cards that consumers can purchase at retail outlets or over the Internet. We do not cover payroll cards or electronic benefit transfer cards, which also can be used over electronic payment networks and can be reloaded at least by the provider of the card.

3.1 Prior studies

Several prior studies have examined the use of arbitration clauses in various types of consumer financial services contracts. In 2004, Demaine and Hensler found that 69.2% of the consumer financial contracts in their sample included arbitration clauses.²⁷ Because they were seeking to determine “the frequency with which the average consumer encounters arbitration clauses,”²⁸ they included at most five contracts from a broad range of contract types in their sample, rather than investigating any particular type of consumer contract in detail.²⁹ Other studies focusing specifically on the use of arbitration clauses in credit card contracts have also relied on small samples, typically from the largest credit card issuers.³⁰ One such study, by Eisenberg, Miller, and Sherwin, found that 76.9% of the consumer contracts studied included arbitration clauses,³¹ and that “every consumer contract with an arbitration clause also included a waiver of classwide arbitration.”³²

²⁷ Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 64 (2004). They included tax preparation and investment contracts, along with credit card and banking contracts, as consumer financial contracts. Limiting their results to credit card and banking contracts, 12 of 17 (70.6%) included arbitration clauses. *Id.*

²⁸ *Id.* at 57.

²⁹ Their sample included two contracts for general credit cards and five each for airline credit cards, store credit cards, and banking contracts. *See id.* at 64. Demaine and Hensler also examined a number of features of the arbitration clauses they studied, but reported only aggregate findings for all consumer contracts.

³⁰ *E.g.*, Public Citizen, Forced Arbitration: Unfair and Everywhere 1 (Sept. 24, 2009), <http://www.citizen.org/documents/UnfairAndEverywhere.pdf> (finding that eight of ten “major providers” of credit cards and five of seven major banks used arbitration clauses); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 145-46 (2010) (reporting that ten of 13 credit card contracts included arbitration clauses).

³¹ Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 883 table 2 (2008). Their sample consisted of “26 consumer agreements drafted by 21 companies,” several of which were consumer financial services companies: three commercial banks (five consumer agreements), two credit card issuers (two consumer agreements), and one financial credit company (one consumer agreement). *Id.* at 881.

³² *Id.* at 884.

Rutledge and Drahozal examined the incidence of arbitration clauses in credit card contracts using a much larger sample made available under the Credit CARD Act of 2009.³³ They found that between 2009 and 2010, “the percentage of [credit card] issuers using arbitration clauses declined from 17.4% ... to 15.0%,” reflecting a net decrease of eight issuers, and that “the percentage of credit card loans subject to arbitration clauses declined from 95.1% to only 48.0%.”³⁴ This study attributed the decline to two events: (1) the National Arbitration Forum ceasing to administer consumer arbitrations following its settlement of a consumer fraud lawsuit filed by the Minnesota Attorney General; and (2) the settlement of an antitrust class action, *Ross v. Bank of America*, by four large credit card issuers, under which they agreed to remove the arbitration clauses from their credit card contracts for a three-and-one-half-year period.³⁵ This study also examined the use of various features of credit card arbitration clauses, ranging from arbitration selection terms to class arbitration waivers.³⁶

In November 2012, the Pew Charitable Trusts issued a study of the use of arbitration clauses in the checking account contracts used by 100 large financial institutions.³⁷ The study found that 43% of the institutions in the sample used arbitration clauses, with a “wide disparity” between

³³ Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1; *see also* Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536 (2012). The relevant statutory provision is Section 204(a) of the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1746 (May 22, 2009).

³⁴ Rutledge & Drahozal, *Contract and Choice*, *supra* note 33, at 19-20.

³⁵ *Id.* at 18-19; *see also infra* note 51. The *Ross* case has continued against several other non-settling defendants. The main allegations in *Ross* are that a group of large credit card issuers colluded to include arbitration clauses, including class waivers, in credit card contracts. *See* First Am. Class Action Compl., *Ross v. Bank of America*, No. 05 CV 07116, ¶¶ 96-119 (S.D.N.Y. June 4, 2009), <http://www.arbitration.cfssettlement.com/documents/files/2009-06-04-1st-amended-complaint.pdf>. The case remains pending.

³⁶ Rutledge & Drahozal, *Contract and Choice*, *supra* note 33, at 21-49.

³⁷ Pew Charitable Trusts, *Banking on Arbitration: Big Banks, Consumers, and Checking Account Dispute Resolution* (Nov. 2012), http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_arbitration_report.pdf; *see also* Public Citizen, *supra* note 30, at 10-11 (deposit account agreements); Pew Health Group, *Hidden Risks: The Case for Safe and Transparent Checking Accounts* 18 (Apr. 2011), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Safe_Checking_in_the_Electronic_Age/Pew_Report_HiddenRisks.pdf (“For 189 of these [265] accounts (representing four out of 10 banks and 71 percent of all accounts), the accountholder had to waive the right to a trial before a judge and agree to have the dispute resolved before a private arbiter of the bank’s choice.”).

the 50 largest (with 56% providing for arbitration) and the remainder of the sample (with 30% providing for arbitration).³⁸ The study also reported on various other features of the arbitration clauses, finding, for example, that “[o]f the institutions in the top 50 that have arbitration clauses, 81 percent have class action bans,” while “[f]or the next 50 institutions, this number drops to 62 percent.”³⁹

No prior study of which we are aware has examined systematically the use of arbitration clauses in GPR prepaid contracts.⁴⁰

3.2 Clause incidence

This section presents data on how frequently arbitration clauses are used in credit card contracts, checking account contracts, and GPR prepaid card contracts. The patterns are similar for credit card and checking account contracts: most institutions do not use arbitration clauses, and credit unions typically do not, but larger institutions are more likely to use arbitration clauses than smaller institutions. As a result, a slight majority of credit card loans outstanding within the scope of our contract sample are subject to arbitration. Similarly, we estimate that just under half of insured deposits at banks are subject to arbitration.⁴¹ By comparison, most GPR prepaid card agreements in our sample, covering the substantial majority of the amounts loaded on such cards, use arbitration clauses. For credit cards, however, the impact of the *Ross* settlement is potentially significant.⁴² While that settlement only removed four issuers from the

³⁸ Pew Charitable Trusts, *supra* note 37, at 3-4.

³⁹ *Id.* at 5. For other features studied, see *id.* at 4-6 (*e.g.*, opt-outs, carve-outs for small claims court, discovery limits, required qualifications for arbitrators, remedy limitations, and shortened statutes of limitations).

⁴⁰ For anecdotal reports on the use of arbitration clauses in GPR prepaid contracts, see, *e.g.*, Pew Charitable Trusts, Loaded with Uncertainty: Are Prepaid Cards a Smart Alternative to Checking Accounts? 29 app. B (Sept. 2012), http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Prepaid_Checking_report.pdf; Martin Eakes, Are Prepaid Credit Cards Helping or Hurting Consumers? (May 25, 2012), <http://www.responsiblelending.org/credit-cards/policy-legislation/regulators/are-prepaid-credit-cards.html>.

⁴¹ We use the term “insured deposits” to refer to the amount of deposits in accounts less than \$250,000.

⁴² The claims at issue in *Ross* were directed at credit card contracts. Neither the claims in the case nor the settlements reached checking account contracts or contracts for any other consumer financial product.

category of arbitration users, those four issuers were responsible for around 43% of credit card loans outstanding as of the end of 2012.

We refer to credit card loans outstanding, insured deposits, and GPR prepaid card load volume as “account values.” In this section, we report incidence both as a percentage of all companies in the samples and as a percentage of all account values in the samples.⁴³ As we explain more fully in Appendix A, our measurements of account value for credit cards and checking accounts use data from public “call reports” filed with regulators by banks and credit unions.⁴⁴ Call reports do not report consumer deposit volume separate from commercial deposit volume. We use “insured deposits,” therefore, as a proxy for consumer deposits.⁴⁵ Our account value results for checking accounts should be viewed accordingly.

The scope of the arbitration clauses that are included in consumer contracts for these products tends to be very broad. Typically, the arbitration clause will apply to all disputes arising out of or relating to the contract and account or card, and sometimes it extends to other aspects of the parties’ relationship. Exceptions to the arbitration clause take the form of carve-outs, such as the small claims court carve-out discussed in section 3.4.2, which exclude certain types of claims from arbitration.

3.2.1 Credit cards

The contracts in our sample cover almost all consumers in the credit card market. The sample on which the findings reported here are based consists of 393 contracts filed by credit card issuers with the Bureau as of December 31, 2012.⁴⁶ Under applicable rules, all credit card issuers

⁴³ By comparison, when we describe the features of arbitration clauses, we present our results as the percentage of arbitration clauses (rather than all contracts) in the samples and as a percentage of account values subject to an arbitration clause (rather than all account values) in the samples.

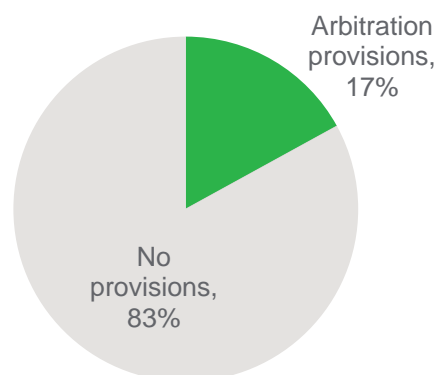
⁴⁴ Call reports are available at the website for the Federal Financial Institutions Examination Council. See www.ffiec.gov.

⁴⁵ To the extent that our proxy includes commercial deposits that are not subject to arbitration, we will overstate the amount of insured deposits subject to arbitration clauses. In general, however, we refer to the share of such deposits subject to arbitration, which should minimize the impact of using this proxy. For more information, see Appendix A.

⁴⁶ The agreements are available at Consumer Financial Protection Bureau, Credit Card Agreement Database, <http://www.consumerfinance.gov/credit-cards/agreements/>.

are required to file agreements if they have more than 10,000 open credit card accounts.⁴⁷ Although many issuers file more than one credit card contract, in almost every case the contracts for a particular issuer contain the same dispute resolution clause. (In the rare cases of inconsistency for a single issuer, we used the predominant form for that issuer as reflected in their filings with the Bureau.) Accordingly, the sample includes one contract per issuer.⁴⁸

FIGURE 1: CLAUSE INCIDENCE BY NUMBER OF CREDIT CARD ISSUERS 2012



Of the 393 credit card issuers, 67 issuers (or 17%) included arbitration clauses in their credit card contracts, while 326 issuers (or 83%) did not.⁴⁹ Larger issuers (as measured by the dollar value of credit card loans outstanding) and banks (as compared to credit unions) were more likely to use arbitration clauses. Thirteen of the 20 largest bank issuers (or 65%) used arbitration clauses. Of the 50 largest bank issuers, 29 (or 58%) used arbitration clauses, and of the remaining bank issuers in the sample, 25 of 56 (or 44.6%) used them. However, only nine of 275

⁴⁷ See 12 CFR § 1026.58(c)(5)(i). Issuers are not required to provide agreements for a private label credit card program with less than 10,000 open accounts. See *id.* § 1026.58(c)(6)(i). (A private label credit card is a credit card issued or managed by a financial institution on behalf of a merchant for use only to make purchases at that merchant—for example, a department store credit card.)

⁴⁸ For additional description of the sample, see Appendix A.

⁴⁹ One issuer provided for arbitration only of disputes involving its credit card rewards program and another only for disputes arising out of credit insurance for credit card loans. Because the agreements did not include a generally applicable arbitration clause, they were coded as not providing for arbitration.

credit union issuers (or 3.3%) used arbitration clauses.⁵⁰ These results are summarized below in Table 1.

TABLE 1: CLAUSE INCIDENCE IN CREDIT CARD CONTRACTS BY TYPE OF ISSUER 2012

	Arbitration clause		No arbitration clause	
	# of contracts	% of credit card loans outstanding	# of contracts	% of credit card loans outstanding
50 largest bank issuers	29 (58.0%)	52.2%	21 (42.0%)	47.8%
Other bank issuers	25 (44.6%)	31.1%	31 (55.4%)	68.9%
Credit unions	9 (3.3%)	2.5%	266 (96.7%)	97.5%
Other issuers	4 (33.3%)	Not available	8 (66.7%)	Not available
Total	67 (17.0%)	50.2%	326 (83.0%)	49.8%

Overall, for the issuers in our sample, 50.2% of credit card loans outstanding were subject to contracts with arbitration clauses; 49.8% of credit card loans outstanding were not. For the 50 largest bank issuers, 52.2% of credit card loans outstanding were subject to arbitration clauses. By comparison, for the remaining (*i.e.*, smaller) banks in the sample, 31.1% of credit card loans outstanding were subject to arbitration, while for credit unions, only 2.5% were.

As noted, however, in late 2009, four of the ten largest issuers (Bank of America, Capital One, Chase, and HSBC) settled an antitrust class action by agreeing to remove the arbitration clauses from their credit card contracts for three-and-one-half years from a date specified in the

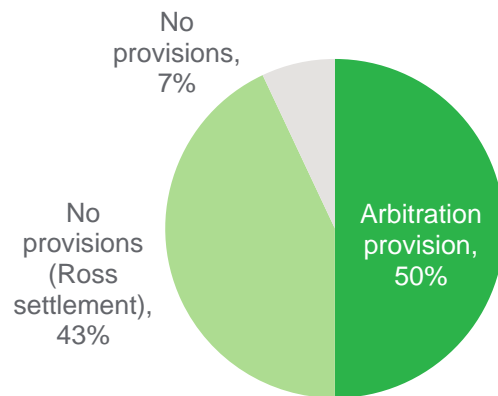
⁵⁰ Four of 12 other issuers (*e.g.*, retailers and finance companies) used arbitration clauses. Data on credit card loans outstanding are missing for two bank issuers, one of which includes an arbitration clause in its credit card contract. Another nine bank and credit union issuers reported zero credit card loans outstanding as of December 31, 2012. Eight of those nine issuers used arbitration clauses.

settlement agreement.⁵¹ Those four companies include the three largest credit card issuers that currently do not use arbitration clauses.⁵² Collectively, their credit card loans outstanding constitute 86.8% of the outstandings that are not subject to arbitration clauses. Had the settling defendants in *Ross* continued to use arbitration clauses, then nearly 94% of credit card loans outstanding would be subject to arbitration clauses.

⁵¹ The dates differed among the settling defendants, and ranged from January 1, 2010, to May 1, 2010. The settlement agreements also provided for the period to be extended in the event of a delay in mailing change-of-terms notices to cardholders. See Stipulation and Agreement of Settlement with Bank of America, N.A. (USA) (N/K/A/ FIA Card Services, N.A.) and Bank of America, N.A., ¶ 3(b), *Ross v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-bank-of-america.pdf>; Stipulation and Settlement Agreement with Capital One Bank (USA), N.A. and Capital One, N.A., ¶ 3(b), *Ross v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-capital-one.pdf>; Stipulation and Agreement of Settlement with JPMorgan Chase & Co. and Chase Bank USA, N.A., ¶ 3(b), *Ross v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-chase.pdf>; Stipulation and Agreement of Settlement with HSBC Finance Corp. and HSBC Bank Nevada, N.A., ¶ 3(b), *Ross v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y. Feb. 24, 2010), <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-24-stip-and-agreement-with-hsbc.pdf>.

⁵² The other issuer, HSBC, sold a substantial portion of its credit card portfolio to Capital One in 2012. See Howard Mustoe, *HSBC Credit Card Sale to Capital One Yields \$2.5 Billion Premium*, Bloomberg.com (May 2, 2012), <http://www.bloomberg.com/news/2012-05-02/hsbc-gets-31-3-billion-in-cash-for-u-s-card-and-retail-sale.html>. As of December 31, 2011, HSBC filed agreements for private label credit cards that included arbitration clauses. Capital One appears to have acquired those accounts as of December 31, 2012, and those cardholder agreements no longer include arbitration clauses.

FIGURE 2: CLAUSE INCIDENCE BY CREDIT CARD LOANS OUTSTANDING 2012



3.2.2 Checking accounts

Our sample of checking account contracts is also designed to provide an overall view of the checking account market. It consists of available contracts from three sources: (1) the 100 largest banks, measured by insured deposits on a consolidated basis⁵³ as of December 31, 2012; (2) a random set of 150 mid-sized and small banks, identified using the same consolidated measure; and (3) the 50 largest credit unions, also measured by insured deposits as of December 31, 2012.⁵⁴ In a handful of cases, different banks in the same holding company used different dispute resolution clauses; those banks were included separately in the sample, instead of on a

⁵³ By consolidated basis, we mean that we calculated total insured deposits for all affiliated institutions, unless an affiliate used a different dispute resolution clause. *See* Appendix A.

⁵⁴ For companies we selected to be in our sample (either because of their size or because they were part of the random selection), we primarily obtained agreements via one of two steps. First, for each credit union and depository subsidiary within the sample, we sought to identify a current web-sourced agreement. (We took the most recent agreement available for the institution’s website, but we did not assume that any web-sourced agreement with an effective date earlier than mid-2011 was current.) When no such agreement was available via that first step, we sent a request for a standard-form checking account contract, pursuant to the Bureau’s market monitoring authority under Section 1022(c)(4) of the Dodd-Frank Act. The response rate to that 1022(c)(4) request was over 95% on a consolidated basis at the time we finalized our data for this publication. We obtained agreements for four bank holding companies via a third step of securing an agreement with no indication of a specific effective date from the applicable website. Ultimately, we obtained agreements for all large banks, 141 out of 150 mid and small-sized banks, and 49 of 50 credit unions. When we present the statutory report, we will include additional data we have secured by that point.

consolidated basis.⁵⁵ In addition, for a small number of banks and one credit union that were selected to be in our sample, we were unable to obtain a standard-form contract by the time we aggregated data for this presentation.⁵⁶ Overall, our sample of checking account contracts included in this presentation covers 49 credit unions and, on a consolidated basis, 103 large and 141 mid-sized and small banks.

Of the 103 largest banks, 47 (or 45.6%) used arbitration clauses while 56 (or 54.4%) did not. Among the 50 largest banks, the use of arbitration clauses was higher—31 of the 50 largest banks (or 62.0%) used arbitration clauses, while 16 of the remaining 53 large banks (or 30.2%) used arbitration clauses. Overall, accounts representing 58.8% of insured deposits at large banks were subject to arbitration clauses, while accounts representing 41.2% of insured deposits at large banks were not.⁵⁷ Taking just the largest 50 banks, accounts representing 61.5% of their insured deposits were covered by arbitration clauses, while accounts representing 38.5% of their insured deposits were not. By comparison, only 10 of the 141 mid-sized and small banks (or 7.1% of the sample), with accounts representing 6.3% of the insured deposits in the sample, used arbitration clauses in their checking account contracts. Finally, 4 of the 49 largest credit unions (or 8.2%), with accounts representing 8.7% of insured deposits at the largest credit unions, used arbitration clauses. These results are summarized in Table 2.

Extrapolating from our random sample and combining it with the large bank data, we can provide an overall estimate of arbitration clause use by the number of banks and by bank insured deposit volume.⁵⁸ On that basis, while only 7.7% of banks use arbitration clauses for

⁵⁵ This is why the sample of 100 large banks results in 103 contracts for these institutions.

⁵⁶ One small institution responded that it did not offer consumer checking accounts.

⁵⁷ Three of the large banks in the sample (with 0.5% of insured deposits) used jury trial waivers but provided for arbitration in the event the jury trial waiver was unenforceable. Because arbitration was not the primary means of dispute resolution, these banks were coded as not using arbitration.

⁵⁸ For the largest banks there is no extrapolation since every bank reported. Out of the 6,320 small and mid-sized banks, we used a randomly selected sample. Thus, our extrapolation provides an unbiased estimate. Moreover, with the sample of 141 banks, out of which 10 reported using arbitration clauses, we can approximate the overall incidence utilizing the Central Limit Theorem with the sample mean of $10/141 = .071$ and the sample variance of $.071*(1-.071) = .066$. The sum of 6,320 variables has a mean of 448 and a standard deviation of 20.4. Thus, using the normal approximation with a 95% confidence interval, we estimate that between 408 and 488 small and mid-sized banks use arbitration clauses. That equates to a range of between 6.5% and 7.7% of small and mid-sized banks.

their checking account contracts, accounts representing some 44.4% of bank insured deposits are subject to arbitration.⁵⁹

TABLE 2: CLAUSE INCIDENCE IN CHECKING ACCOUNT CONTRACTS BY TYPE OF FINANCIAL INSTITUTION 2013

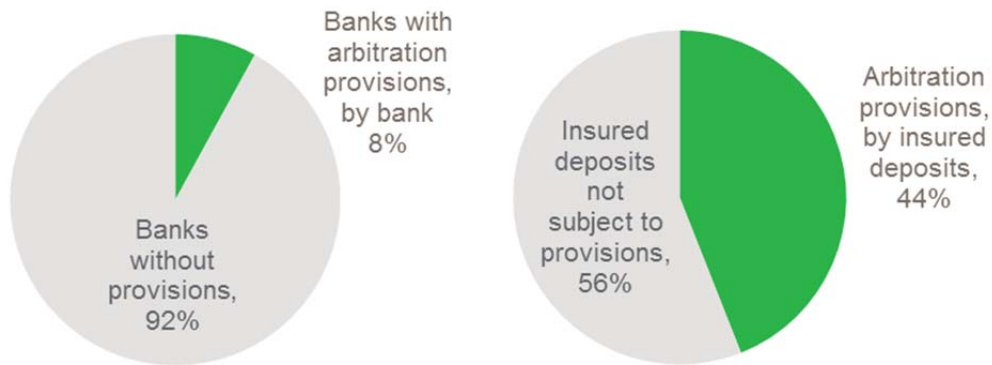
	Arbitration clause		No arbitration clause	
	# of contracts	% of insured deposits	# of contracts	% of insured deposits
50 largest banks	31 (62.0%)	61.5%	19 (38.0%)	38.5%
Other large banks	16 (30.2%)	30.0%	37 (69.8%)	70.0%
Small to mid-sized banks	10 (7.1%)	6.3%	131 (92.9%)	93.7%
50 largest credit unions	4 (8.2%)	8.7%	45 (91.8%)	91.3%

Overall, therefore, we see for checking accounts the same phenomenon we observe for credit cards: clause use is concentrated among large players with larger market shares. Conversely, non-use is concentrated among small players with smaller market shares. And in both markets, credit union use of arbitration clauses is low, by number of issuers and by market share.⁶⁰

⁵⁹ As of December 31, 2012, small and mid-sized banks accounted for \$1,166,216,407,000 in insured deposits. Extrapolating from our sample, for which institutions with arbitration clauses accounted for 6.3% of all insured deposits in the sample, we estimate that \$73,471,633,641 in insured deposits held by small and mid-sized banks are subject to arbitration, and \$1,092,744,773,359 are not so subject. For the largest banks, call report data show that \$1,820,588,262,000 of insured deposits are subject to arbitration, with \$1,274,683,807,000 of insured deposits not so subject. Combining the two sets of data $((\$73,471,633,641 + \$1,820,588,262,000) / (\$73,471,633,641 + \$1,820,588,262,000 + \$1,092,744,773,359 + \$1,274,683,807,000))$ gives an estimate of 44.4% of insured bank deposits subject to arbitration.

⁶⁰ We cannot extrapolate from the sample of checking account contracts for the largest credit unions because it is not random. That sample, however, represents more than 28.3% of all credit union insured deposit volume. Given the low incidence of use among small banks, overall use by credit unions is likely to be even lower than the low share indicated for the largest credit unions.

FIGURE 3: CLAUSE INCIDENCE BY BANK AND BANK INSURED DEPOSIT VOLUME 2013



3.2.3 GPR prepaid cards

Our data on GPR prepaid card agreements is less complete than for the other types of contracts studied. The sample here consists of 63 GPR prepaid cards that were listed on the Visa, MasterCard, or NerdWallet web pages that list prepaid cards or that were included in several recent studies of the terms of GPR prepaid cards.⁶¹ Three firms—Green Dot, H&R Block, and NetSpend—dominated the market, collectively with over 68% of the dollar amount loaded on cards.⁶²

For the sample as a whole, 51 of 63 GPR prepaid card contracts (81.0%) included arbitration clauses. All three of the leading firms, with 68.6% of the market, used arbitration clauses. Indeed, all of the firms for which we have market share data, totaling 82.9% of the dollar

⁶¹ See Appendix A for more details.

⁶² See Aité Group, *The Contenders: Prepaid Debit and Payroll Cards Reach Ubiquity 19* (Nov. 2012). The firms identified in the text are formally not issuers of prepaid cards; the issuers are almost always depository institutions. (GreenDot, however, now owns a bank issuer.) Firms like NetSpend (which has since been acquired by another company, TSYS) are generally referred to as “program managers.” In the GPR prepaid market, the program manager generally plays the dominant role with responsibility for most aspects of a program. Two depository institutions, Bankcorp Bank and MetaBank, serve a large number of GPR program managers. There is no consistent pattern in the cardholder agreements: some cards with the same program manager or the same issuing bank nonetheless have different cardholder agreements.

amount loaded on cards, used arbitration clauses, and the substantial majority of the remaining cards (40 of 52, or 76.9%) used arbitration clauses as well.⁶³ Thus total load in the pre-paid market subject to arbitration will be over—and likely substantially over—83%. The overall use of arbitration clauses in GPR prepaid card contracts is greater than in either credit card or checking account contracts, and much more uniform across larger and smaller players in the market—*i.e.*, smaller players are much more likely to use arbitration clauses in GPR prepaid card contracts than in credit card or checking account contracts. Consistent with our results for credit unions in the other two markets, the contracts in the sample from two credit union GPR prepaid card programs did not use arbitration clauses, although a third program used by credit unions and small banks does include an arbitration clause in its cardholder agreement.

3.3 Clause length and complexity

For credit card contracts with arbitration clauses, we examined various measures of the length and complexity of the arbitration clause.⁶⁴ We have not conducted the same analysis for the other two product markets.

The word count for the credit card arbitration clauses ranged from 78 words to 2,410 words. The mean was 1,098 words and the median was 1,074 words. On average, the arbitration clause made up 14.1% of the words in the credit card contract (with the median at 13.1%), ranging from 1.2% to 27.5% of the words in the contract.

Credit card arbitration clauses almost always were more complex and written at a higher grade level than the rest of the credit card contract. The mean Flesch readability score⁶⁵ for credit card

⁶³ Our market share data comes from the Aité Group report cited in note 62.

⁶⁴ Three of the contracts (all from credit unions) incorporated by reference the arbitration clause in the credit union's membership agreement. For purposes of our analysis, we used the arbitration clause from the membership agreement for the two membership agreements we were able to obtain rather than the incorporation-by-reference language in the credit card contract. We treated the arbitration clause for the other credit union (which we were not able to obtain) as missing. Accordingly, the results in this section are based on 66 credit card arbitration clauses.

⁶⁵ The Flesch readability score is a widely used standard in plain language analysis. Scores range from 0.0 to 100.0, with a higher number indicating greater readability. The calculation of the score takes into account total words, total sentences, and total syllables.

arbitration clauses—with a higher score indicating greater readability—was 34.5 and the median was 33.7.⁶⁶ By comparison, the mean Flesch readability score for the remainder of the contract (*i.e.*, excluding the arbitration clause) was 52.2 and the median was 51.6.⁶⁷ The readability score for the remainder of the credit card contract exceeded the readability score for the arbitration clause in every case.⁶⁸

Similarly, the mean Flesch-Kincaid grade level⁶⁹—with a lower grade level indicating greater readability—for credit card arbitration clauses was 14.2 and the median was 14.7.⁷⁰ By comparison, the mean Flesch-Kincaid grade level for the remainder of the credit card contract was 10.8 and the median was 11.⁷¹ Of the 66 contracts studied, only in three cases was the Flesch-Kincaid grade level lower for the arbitration clause than for the remainder of the contract.

Arbitration clauses from larger issuers tend to be longer than those from smaller issuers. On average, the arbitration clause used by the 20 largest issuers contained 1,330 words, while for the other issuers the arbitration clause contained 1,051 words. But the arbitration clauses used by the larger issuers fare better on the readability metrics. The Flesch readability score for the arbitration clause used by the 20 largest issuers was 37.1. For the remaining issuers it was 33.5. The Flesch-Kincaid grade level for the arbitration clauses used by the 20 largest issuers was 13.5. For the remaining issuers it was 14.6.⁷²

⁶⁶ The low was 18.2; the high, 51.1.

⁶⁷ The low was 43.3; the high, 66.9.

⁶⁸ On average, the readability score for the contract was 17.7 points higher than the score for the arbitration clause, with the differences ranging from 2.3 to 38.9.

⁶⁹ The Flesch-Kincaid Grade level translates readability to the level of education required to understand the text. A lower grade level indicates greater readability.

⁷⁰ The low was 9; the high, 20.3.

⁷¹ The low was 6.3; the high, 13.3.

⁷² Two of the three largest credit card issuers used two of the three most readable arbitration clauses (by both measures) in their credit card contracts.

3.4 Clause features

This section summarizes various provisions that appear in or with arbitration clauses in credit card, checking account, and GPR prepaid card contracts. It examines: (1) whether the clause allows the consumer to reject the arbitration clause for a limited period; (2) whether the clause carves disputes eligible for small claims court out of the obligation to arbitrate; (3) which entity or entities may administer the arbitration and how the arbitrator or arbitrators are to be selected; (4) the extent to which enforceability decisions are delegated to the arbitrator; (5) whether the clause precludes class proceedings; (6) whether the clause limits the recovery of punitive or other damages; (7) whether the clause delimits the time period in which a claim must be brought; (8) whether the clause precludes the disclosure of information about any arbitration; (9) where any in-person hearing is to take place; (10) what the clause provides about the costs of arbitration to the consumer and the company; (11) whether the clause provides for a contingent minimum recovery; and (12) what the clauses disclose about various core characteristics of the arbitration process. For all these variables, we present summary results below.⁷³

For several of the features studied, the contract provision can appear either in the arbitration clause itself or elsewhere in the contract. For example, punitive damages or consequential damages waivers sometimes are included in the arbitration clause, but more commonly are a stand-alone provision of the contract. Indeed, such provisions appear not only in contracts with arbitration clauses but also contracts without arbitration clauses. To obtain a meaningful understanding of the incidence of these sorts of provisions requires examining not only the features of arbitration clauses or even the features of consumer financial services contracts with arbitration clauses, but also the features of consumer financial services contracts without arbitration clauses. In the sections in which this type of comparison is appropriate, we report the comparative numbers.

For each feature, we express the incidence of that feature as a percentage of the number of arbitration clauses in the sample for that product. We also state incidence as a percentage of the

⁷³ Some of the features described below may be inconsistent with the due process or fairness protocols applied by the AAA and JAMS in administering consumer arbitrations. *See infra* text accompanying note 80. We describe the features here as they appear in the arbitration clauses in the sample, without regard to the AAA's or JAMS's policies.

account values (credit card loans outstanding, insured deposits, amount loaded on prepaid cards) of the market players in the sample subject to arbitration clauses (which, as a shorthand, we refer to as “arbitration-subject” account values). For credit cards, we can infer that the data reflect the overall incidence of these features for all market players who use arbitration clauses.⁷⁴ For checking accounts, we can extrapolate from the two samples of banks to obtain an estimate for overall incidence for banks that use arbitration clauses. However, this extrapolation is less stable than it is for incidence overall given the very limited extent to which smaller banks use arbitration clauses at all.⁷⁵ For GPR prepaid cards, the market share data are limited as discussed above.⁷⁶ As a result, for checking accounts and prepaid cards we do not extrapolate from the sample to estimate overall incidence of clause features.

3.4.1 Opt-outs

Some of the arbitration clauses in the sample permitted consumers a defined time period to opt-out of or reject the arbitration clause. To exercise the opt-out, a consumer must follow the stated procedure—which generally requires a signed writing submitted by mail, and may include requirement that all authorized users on the account consent in writing to the opt-out—within the stated time limits.⁷⁷

Just over a quarter of the credit card arbitration clauses in the sample (18 of 66, or 27.3%) and of the checking account arbitration clauses in the sample (16 of 61, or 26.2%) included opt-outs, as did 17.6% (9 of 51) of prepaid card arbitration clauses in the sample. The time allowed for opting out was generally either 30 days or 60 days, typically from when the account was opened or the agreement was mailed, depending on the arbitration clause. No agreements provided for shorter or longer opt-out periods, and very few provided for periods (such as 45 days) between the two ends of this range.

⁷⁴ See *supra* text accompanying note 47.

⁷⁵ Because the sample is randomly selected, the extrapolation provides an unbiased estimate. However, given that the sample size for the small and mid-sized banks with arbitration clauses is only ten, it is arguably too small to apply the normal approximation.

⁷⁶ See *supra* text accompanying note 61; see also Appendix A.

⁷⁷ We are not currently aware of prevailing opt-out rates.

For checking accounts and prepaid cards, larger players tended to be somewhat more likely than smaller ones to permit consumers to opt out of the arbitration clause. Some 38.3% of arbitration-subject insured deposits in the sample had an opt-out feature, as did 26.5% of dollar amounts of arbitration-subject prepaid card loads. For credit cards, 26.0% of arbitration-subject loans outstanding in the sample had an opt-out. These results are summarized in Table 3.

TABLE 3: ARBITRATION CLAUSES PERMITTING OPT-OUTS FROM ARBITRATION 2012-13

	Opt-out		No opt-out	
	# of contracts	% of arbitration-subject account values	# of contracts	% of arbitration-subject account values
Credit cards	18 (27.3%)	26.0%	48 (72.7%)	74.0%
Checking accounts	16 (26.2%)	38.3%	45 (73.8%)	61.7%
Prepaid cards	9 (17.6%)	26.5%	42 (82.4%)	73.5%

3.4.2 Small claims

While arbitration clauses typically are drafted broadly to cover a wide range of claims and disputes, most of the agreements studied “carved out,” or excluded, certain claims or disputes from arbitration. The most common type of carve-out was for claims that either could be or had been brought in small claims court. A small claims court carve-out is not necessary for parties to use small claims court. What the carve-out typically provides, however, is a contractual right to press a claim in small claims court even if the other side would prefer that the claim be resolved in arbitration.

From 59% (checking) to 62.7% (prepaid card) to 66.7% (credit card) of arbitration clauses in the samples included carve-outs for small claims court, with large institutions more likely to use such carve-outs than small institutions. The 33.3% of credit card issuers that did not use a small claims court carve-out in their arbitration clause made up only 1.0% of arbitration-subject credit card loans outstanding. Although the percentages were not as stark for checking account contracts (41% without a carve-out, comprising 8.5% of arbitration-subject insured deposits in the sample) and prepaid card contracts (37.3% without a carve-out, comprising between 5.6% to 15.3% of arbitration-subject loads in the sample), the pattern was the same.

The small claims court carve-outs in arbitration clauses in checking account contracts and credit card contracts tended to apply to both companies and consumers.⁷⁸ Carve-outs for consumer small claims only, however, were the dominant form of carve-out for prepaid cards.⁷⁹ These results are summarized in Table 4.

TABLE 4: ARBITRATION CLAUSES WITH SMALL CLAIMS COURT CARVE-OUTS 2012-13

	Small claims court carve-out		No small claims court carve-out	
	# of contracts	% of arbitration-subject account values	# of contracts	% of arbitration-subject account values
Credit cards	44 (66.7%)	99.0%	22 (33.3%)	1.0%
Checking accounts	36 (59.0%)	91.5%	25 (41.0%)	8.5%
Prepaid cards	32 (62.7%)	84.7%-94.4%	19 (37.3%)	5.6%-15.3%

3.4.3 Administrators and arbitrators

Arbitration clauses commonly specify a firm to administer the arbitration. The administrator is not the arbitrator *per se*, although as discussed below the administrator may select the arbitrator. The administrator generally sets out the procedural rules governing the arbitration. In some cases, these rules may be modified by the terms of the applicable arbitration clause. Some rules, however, may be deemed by the administrator to be not subject to contractual modification. The two main administrators of consumer arbitration in the United States each have due process or minimum procedural fairness protocols, and their respective rules state that

⁷⁸ Some 34.4% of the checking account arbitration clauses in the sample had this feature, representing 74.2% of the arbitration-subject insured deposits in that sample. For credit card arbitration clauses, the numbers were 39.4% of the agreements and 62.2% of the arbitration-subject credit card loans outstanding.

⁷⁹ Some 43.1% of prepaid card arbitration clauses in our sample had this feature, accounting for between 84.4% and 94.2% of arbitration-subject loads in our sample. One possible explanation for this difference is that few prepaid cards offer a credit line, with the result that prepaid issuers generally have no small-dollar debts to collect.

they will not administer arbitrations except in accordance with those core provisions.⁸⁰ Finally, the administrator provides other administrative services, such as docketing or finding hearing locations.

The arbitration administrator most commonly named in the clauses that we studied was the AAA. Some 55.7% of checking account arbitration clauses in the sample listed AAA as the sole option.⁸¹ One listed JAMS as the sole option. (One also listed the National Arbitration Forum (“NAF”) as the sole option, even though NAF ceased administering consumer arbitrations more than four years ago.⁸²) Nearly half (48.5%) of credit card arbitration clauses in the sample listed AAA as the sole option.⁸³ Three listed JAMS and three listed NAF as sole options. More than a third (37.3%) of prepaid arbitration clauses in the sample listed AAA as a sole option.⁸⁴ For prepaid, only one each listed JAMS or NAF as sole options.⁸⁵

Counting clauses in which AAA is at least an option yields 91.8% of checking account arbitration clauses, 83.3% for credit card arbitration clauses, and 94.1% of prepaid card arbitration clauses. The comparable numbers for JAMS are 34.4% for checking accounts, 40.9% for credit cards, and 52.9% for prepaid cards. By market share, the predominance of the AAA was even greater. Over 98% of the relevant account value—whether insured deposits, credit card loans outstanding, or prepaid load—subject to arbitration clauses in the samples listed the AAA as at least one possible administrator. When an arbitration clause listed more than one administrator, it typically permitted the party filing the claim to select among the

⁸⁰ AAA, Consumer Due Process Protocol (Apr. 17, 1998); JAMS, Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness (July 15, 2009).

⁸¹ Counting clauses that listed AAA or NAF (which no longer administers consumer disputes), this share increases to 60.7%.

⁸² Consent Judgment, *Minnesota v. National Arbitration Forum, Inc.*, No. 27-CV-09-18550 (Minn. Dist. Ct. July 17, 2009), <http://pubcit.typepad.com/files/nafconsentdecreedecree.pdf>.

⁸³ This increases to 50% counting clauses that list AAA or NAF.

⁸⁴ This increases to 43.1% counting clauses that list AAA or NAF.

⁸⁵ Other less well known administrators listed were National Arbitration and Mediation, Dispute Prevention and Resolution, Inc., and the Arbitration Service of Portland, each included in a single arbitration clause from a small institution.

administrators, except for prepaid card arbitration clauses, which commonly permitted the consumer to override the company’s choice even when the company was the claimant.⁸⁶

In AAA arbitrations, the AAA selects the arbitrator, subject to possible objections by the parties.⁸⁷ In JAMS arbitrations, JAMS may supply a list of arbitrators from which the parties may choose.⁸⁸ In either case, however, the default rule is that the administrator determines the pool of prospective arbitrators, even though it does not arbitrate the dispute itself.⁸⁹ Most of the clauses within the scope of our review did not attempt to modify these default rules for arbitrator selection. A minority specified that the arbitrator be a retired judge or an experienced lawyer or a lawyer with expertise in the subject matter of the dispute.⁹⁰ One clause for a small bank, required “practical working experience in the banking industry.” That is the only clause that we identified, however, to use selection criteria that might be seen as an explicit bias to one side of the dispute.⁹¹

⁸⁶ If prepaid issuers seldom sue consumers, *see supra* note 79, this consumer default may be equivalent to the claimant default rule for checking and credit card.

⁸⁷ *See* AAA, Supplementary Procedures for Consumer-Related Disputes, Rule C-4 (rules effective Sept. 15, 2005).

⁸⁸ *E.g.*, JAMS, Streamlined Arbitration Rules & Procedures, Rule 12(c) & (d) (effective July 15, 2009).

⁸⁹ The administrator’s rules and applicable law typically require the arbitrator to disclose conflicts of interest, which may provide a basis for a party to object to the arbitrator’s service. *E.g.*, AAA, Commercial Arbitration Rules and Mediation Procedures, Rules R-17 & R-18 (Oct. 1, 2013); JAMS, Streamlined Arbitration Rules & Procedures, *supra* note 88, Rule 12(i) & (j).

⁹⁰ The two most common formulations required either that the arbitrator be a lawyer with at least ten years’ experience or a retired judge (18.0% of checking account arbitration clauses, covering 16.8% of arbitration-subject insured deposits; 30.3% of credit card arbitration clauses, covering 36.1% of arbitration-subject credit card loans outstanding; and 3.9% of prepaid card arbitration clauses, covering 30.9% of arbitration-subject card loads), or that the arbitrator be a practicing lawyer where the arbitration is held and have expertise in the applicable substantive law (3.3% of checking account arbitration clauses, covering 26.7% of arbitration-subject insured deposits; 4.5% of credit card arbitration clauses, covering 7.4% of arbitration-subject credit card loans outstanding; and 2.0% of prepaid card arbitration clauses; no load data).

⁹¹ *Compare Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 924-25 (9th Cir. 2013) (clause providing for each party to identify three candidates to serve as arbitrator; parties, beginning with respondent, take turns striking candidates; last remaining candidate, who presumably had been initially identified by respondent, to serve as arbitrator) *with Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (clause giving employer unilateral control of pool from which arbitrators selected).

3.4.4 Delegation

The Federal Arbitration Act allocates authority between courts and arbitrators to decide certain legal challenges to the enforceability of arbitration clauses. As a general rule, only an arbitrator can decide challenges to the legal validity of the overall contract that contains the clause. Courts, however, may decide challenges to the enforceability of the arbitration clause itself, and they can also decide whether a party assented to the contract that includes the clause.⁹² In *Rent-A-Center West, Inc. v. Jackson*, however, the Supreme Court ruled that parties could delegate to the arbitrator at least some issues that otherwise would be for the court to decide.⁹³ In that case, the Court concluded that based on the terms of the parties' agreement, the arbitrator—not the courts—should properly decide whether the arbitration clause was unconscionable.⁹⁴ The effect of such delegation clauses is to reduce substantially the role of courts in policing the fairness of arbitration clauses when they are included in a contract.

Although none of the arbitration clauses in the samples directly track the language used by the clause in *Rent-A-Center*, a majority of these clauses delegated to the arbitrator exclusive authority to make decisions about the enforceability of the arbitration clause.⁹⁵ The share ranged from 39.3% of arbitration clauses in the checking account sample, to 51.5% of credit card clauses, to 60.8% of prepaid card clauses.⁹⁶ A number of clauses, however, did the opposite: they reserved such authority to the court through an “anti-delegation clause.” For checking accounts, 26.2% of the clauses in the sample have this feature. The numbers for credit cards and prepaid cards are 13.6% and 7.8% respectively.

⁹² See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (fraudulent inducement of main contract for arbitrator to decide); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (illegality of main contract for arbitrator to decide).

⁹³ 130 S. Ct. 2772 (2010).

⁹⁴ *Id.* at 2778-79.

⁹⁵ *Id.* at 2777 (“[T]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the ... enforceability ... of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.”).

⁹⁶ For arbitration-subject account values, the shares are 51.6%, 46.0% and 42.6% for checking, credit cards, and prepaid cards respectively.

These data points actually understate the extent of delegation to the arbitrator for two reasons. First, an additional category of arbitration clauses delegated most enforceability issues to the arbitrator, but expressly reserved to the court the exclusive authority to decide the enforceability of any contractual limitations on class proceedings. This category appeared in 8.2% of the checking account clauses, 25.8% of the credit card clauses, and 13.7% of the prepaid card clauses. Second, most courts hold that language on arbitrator authority typically included in arbitration rules promulgated by administrators has the same effect as a delegation clause (although of course express delegation language in an arbitration clause overrides the administrator rule).⁹⁷ Because almost all of the arbitration clauses in the sample without delegation clauses (ranging from 9.1% of credit card arbitration clauses to 17.6% of prepaid card arbitration clauses to 26.2% of checking account arbitration clauses) nonetheless selected an administrator, those clauses effectively also contained a delegation clause, at least under current court decisions.⁹⁸

3.4.5 Class action terms

Almost all of the arbitration clauses studied contained terms limiting class proceedings. Thus, 93.9% of the clauses in our credit card sample, 88.5% of arbitration clauses in our checking account sample, and 96.1% of clauses in our prepaid sample did not allow arbitration to proceed on a class basis. The handful of clauses that did not include such no-class-arbitration terms tended to be from very small institutions. Thus, in our samples, class arbitration was unavailable for 99.9% of arbitration-subject credit card loans outstanding, 97.1% of arbitration-subject insured deposits, and essentially 100.0% of arbitration-subject dollar amounts loaded on prepaid cards. An arbitration clause that does not allow class arbitration precludes any dispute subject to arbitration from proceeding as a class action—either in court or in arbitration. These results are summarized in Table 5.

⁹⁷ See, e.g., *Oracle Am., Inc. v. Myriad Group, A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (“Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association’s (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.”).

⁹⁸ Fifteen of the 16 checking account arbitration clauses without delegation clauses specified an administrator (almost always the AAA). Five of the six credit card arbitration clauses and eight of the nine prepaid card arbitration clauses without delegation clauses likewise specified an administrator (again, most commonly the AAA, either by itself or with JAMS).

TABLE 5: ARBITRATION CLAUSES WITH NO-CLASS-ARBITRATION PROVISIONS 2012-13

	No class arbitration		No provision on class arbitration	
	# of contracts	% of arbitration-subject account values	# of contracts	% of arbitration-subject account values
Credit cards	62 (93.9%)	99.9%	4 (6.1%)	0.1%
Checking accounts	54 (88.5%)	97.1%	7 (11.5%)	2.9%
Prepaid cards	49 (96.1%)	100.0%	2 (3.9%)	0.0%

Some contracts with arbitration clauses also included provisions waiving the right to participate in a class action in court, either as a named plaintiff or a member of the class, or otherwise precluding the case from proceeding as a class action, for cases *not subject to arbitration*. Just over 30% (19 of 61, covering 10.1% of arbitration-subject insured deposits) of checking account arbitration clauses, 13.6% (9 of 66, covering 9.7% of arbitration-subject credit card loans outstanding) of credit card arbitration clauses, and 5.9% (3 of 51; no load data) of prepaid arbitration clauses included such provisions.⁹⁹ By comparison, two checking account contracts without arbitration clauses from the large bank sample and three from the mid-sized to small bank sample included provisions directly waiving class actions in court. One credit card contract without an arbitration clause and no prepaid card contracts without arbitration clauses included such class action waivers.

Most of the checking and credit card arbitration clauses in the samples also contained an “anti-severability provision,” stating that if the no-class-arbitration terms are held unenforceable, the

⁹⁹ A number of these class litigation provisions appeared outside the arbitration clause. This was the case for 13 of the 19 checking account contracts with arbitration clauses, and one of the nine credit card contracts with arbitration clauses. The remainder appeared only within the arbitration clause. Class litigation provisions within the arbitration clause are generally more ambiguous. They can be seen as waiving class actions in cases not subject to arbitration, but they might instead be seen simply as stating the consequences of the arbitration clause.

entire arbitration clause is thereby rendered unenforceable as well.¹⁰⁰ Absent that provision, a court might hold a no-class-arbitration term unenforceable but the rest of the arbitration clause enforceable, meaning that the dispute might then proceed as a class arbitration. With an anti-severability provision, however, if a court held the no-class-arbitration terms unenforceable the arbitration clause would become unenforceable as well, and the case might proceed as a class action in court rather than as a class arbitration. Close to a majority of the checking account arbitration clauses (49.2%, covering 83.2% of arbitration-subject insured deposits) and a slight majority of credit card arbitration clauses in the sample (54.5%, covering 66.3% of arbitration-subject credit card loans outstanding) included such anti-severability provisions, with their use being more likely by larger banks and issuers. But only 29.4% of prepaid card arbitration clauses (covering 26.7% of arbitration-subject prepaid loads) had an anti-severability provision.

3.4.6 Relief limits

There is wide variation in the markets we have studied to date with respect to the inclusion in contracts with arbitration clauses of provisions to limit damages—most commonly punitive and consequential damages. Just over 15% of credit card contracts with arbitration clauses in the sample, covering less than 9% of arbitration-subject credit card loans, included damage limitations. A slight majority of the damage limitations in these credit card contracts precluded the award of punitive damages or consequential damages or both. But many were not absolute prohibitions, instead either requiring arbitrators to follow constitutional standards for the award of punitive damages¹⁰¹ or setting out special procedures to be followed in the case of an award of punitive damages.¹⁰²

¹⁰⁰ A severability clause generally states that if a contract provision is unenforceable that provision will be treated as severable from the rest of the contract so that the rest of the contract remains enforceable. An anti-severability term does the opposite—it makes one or more provisions not severable from the contract or, in this case, from the arbitration clause.

¹⁰¹ Because courts usually hold that arbitration does not constitute state action, constitutional limitations on the award of punitive damages might not otherwise apply. *See, e.g., MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 872 A.2d 423 (Conn. 2005); *Mave Enter., Inc. v. Travelers Indem. Co. of Conn.*, 2013 WL 5740159 (Cal. Ct. App. Oct. 23, 2013). For an example of such a constitutional limitation see *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (holding that punitive damages award violated due process based on consideration of “the degree of reprehensibility of the [conduct], the disparity between the harm or potential harm suffered by [the

By comparison, over 60% of checking account contracts with arbitration clauses in the sample, covering almost 80% of arbitration-subject insured deposits, included some damages limitation.¹⁰³ (Prepaid card contracts were closer to credit card contracts in frequency.) In most checking account contracts, the damages limitation was not in the arbitration clause but elsewhere in the contract. Provisions precluding the award of punitive damages, consequential damages, or both consequential damages and punitive damages, appeared in 52.5% of the contracts (covering 69.0% of arbitration-subject insured deposits). Like the credit card contracts, some checking account contracts (8 of 61, or 13.1%; 9.2% of arbitration-subject insured deposits) made constitutional standards for the award of punitive damages applicable in arbitration.¹⁰⁴

A review of contracts without arbitration clauses reveals a roughly similar pattern, albeit with damages limitations somewhat less common. Just over 35% of large bank checking account contracts without arbitration clauses included either a consequential damages waiver or a consequential damages waiver and a punitive damages waiver. For small to mid-sized banks, 6.1% of checking account contracts without arbitration clauses included such damages limitations. A third of the prepaid card contracts without arbitration clauses included a consequential damages waiver or a punitive damages waiver or both. Only one of the credit card agreements without arbitration clauses limited the recovery of either punitive or consequential damages.

plaintiff] and his punitive damages award, and the difference between the remedy and the civil penalties authorized or imposed in comparable cases”).

¹⁰² The constitutional limit appears in three of 66 credit card arbitration clauses in our sample, representing 2.2% of arbitration-subject loans outstanding. One clause, representing 4.7% of arbitration-subject credit card loans outstanding, requires the arbitrator to follow specific procedures before making an award of punitive damages. The required procedures include issuing a reasoned award and conducting a post-award review of punitive damages, comparable to what would occur in court.

¹⁰³ This share does not include provisions dealing with the award of consequential damages for specific types of actions by banks, such as wrongful dishonor or errors in processing wire transfers, which are addressed specifically in the Uniform Commercial Code. UCC §§ 4-402(b), 4A-305(c).

¹⁰⁴ A handful of clauses purported to preclude the award of punitive damages while also authorizing the arbitrator to award punitive damages subject to constitutional standards.

3.4.7 Time limits

Few credit card and prepaid card contracts with arbitration clauses set time limits for consumers to file claims in arbitration. Two prepaid card contracts with an arbitration clause set a time limit of two years from when the consumer's claim arose for the consumer to file a claim in arbitration. (One of them applied the same time limit to company claims.) Four credit card arbitration clauses, all from small issuers, specified time limits for consumer claims, most commonly one year from when the claim arose. One of these issuers, however, required both the issuer and the consumer to give the other notice of any claim within 90 days of the claim arising.¹⁰⁵

A greater number of checking account contracts with arbitration clauses set time limits on consumers filing claims in arbitration, although the time limits themselves were not included in the arbitration clause. Around 13% of the checking account contracts in the sample had such provisions, representing 28.4% of arbitration-subject insured deposits. These generally ranged from one to two years from when the consumer's claim arose. Again, however, one included a 90-day notice of claim requirement for both the bank and the consumer.

Overall, the pattern was generally similar for contracts without arbitration clauses. For large banks, 10.7% of checking account agreements without arbitration clauses had one-year time limits for consumer claims; of the small and mid-sized banks, 1.5% had such limits. Of credit card contracts without arbitration clauses, 2.5% had time limits, again requiring consumers to bring claims within a year of the claim arising. Only one of the prepaid cards without arbitration clauses had a time limit.

3.4.8 Confidentiality and nondisclosure

Unlike a judicial proceeding, arbitration as a general matter is a private process: filings are not publicly available and hearings are not open to the public. Arbitration rules typically do not impose express confidentiality or nondisclosure obligations on parties to the dispute, although

¹⁰⁵ The provision added that the sending of a monthly billing statement by the issuer satisfied the issuer's notice obligations.

arbitrator ethics rules do impose confidentiality obligations on the arbitrator.¹⁰⁶ Most arbitration clauses in the sample were silent on confidentiality and did not impose any nondisclosure obligation on the parties. Only one prepaid card arbitration clause (2.0% of clauses; no load data) and two credit card arbitration clauses (3.0% of clauses, covering 7.3% of arbitration-subject credit card loans outstanding) precluded the parties from making disclosures about the arbitration proceeding, including its existence and outcome. Non-disclosure provisions were more common in checking account arbitration clauses, where they appeared in 11.5% of clauses covering 28.0% of arbitration-subject insured deposits. By comparison, none of the contracts without arbitration clauses imposed non-disclosure obligations on the parties to a dispute.

3.4.9 Hearing location

The arbitration clauses in the samples generally addressed the location of in-person hearings.¹⁰⁷ All but five prepaid card arbitration clauses (covering almost all arbitration-subject load volume) and all but nine credit card arbitration clauses (covering 92.6% of arbitration-subject credit card loans outstanding) addressed the issue. This feature was less common for checking accounts, but even there 63.1% of the arbitration-subject insured deposits in the sample addressed the hearing location.

The clauses specified a range of locations. The most common was that the hearing would be held in the federal judicial district of the consumer's residence. A common variation was for the hearing to be held in the same city as the U.S. District Court closest to the consumer.¹⁰⁸ Other

¹⁰⁶ American Bar Association & American Arbitration Association, Code of Ethics for Arbitrators in Commercial Disputes, Canon VI(B) (Feb. 9, 2004), http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf (“The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.”).

¹⁰⁷ Under the AAA's Supplementary Procedures, the default is for disputes under \$10,000 to be resolved on the basis of document submissions (which is known as a “desk hearing”), although either party may request an in-person or telephonic hearing. AAA, Supplementary Procedures for Consumer-Related Disputes, Rule C-5 (Effective Sept. 15, 2005). For disputes over \$10,000, “the arbitrator will conduct a hearing unless the parties agree not to have one.” *Id.* Rule C-6.

¹⁰⁸ A much less common variation, used by four small credit card issuers and one small bank in its checking account contract called for the hearing to be held in the “federal judicial circuit” of the consumer's residence.

clauses identified the consumer’s state or county as the site of the hearing. Depending on the product market, between 3.9% to 18.0% of the clauses in the samples provided that any arbitration hearing would be at a location “reasonably convenient” for the customer. A handful of arbitration clauses—all associated with small institutions—identified specific cities or states in which hearings were to be held. Similarly, two arbitration clauses in checking account contracts, both from small banks, identified the place where the account was opened as the location of the hearing.

Contracts without arbitration clauses also specified hearing locations using choice-of-court clauses mandating an exclusive forum for any court case, but did so less frequently than contracts with arbitration clauses. Of the large banks using checking agreements without arbitration clauses, 21.4% specified the location of any court proceeding (most commonly, the state where the account is located); 4.6% of checking account agreements without arbitration clauses for small and mid-sized banks specified the location of any court proceeding (most commonly the city where the contract was signed or a specific state and federal court). Only 3.7% of the credit card contracts without arbitration clauses specified the location of any court proceeding, while 33.3% of prepaid card contracts without arbitration clauses did so.

3.4.10 Costs

In court systems, the government pays the salaries of judges and much of the cost of administering cases, although the filing fees required when initiating a case may defray a part of these costs. In arbitration, by contrast, the parties pay all the costs of arbitrating the dispute. As a result, the total up-front cost of filing a claim in arbitration—at least for the parties combined—is typically higher than the up-front cost of filing a lawsuit in court. Under the rules adopted by the AAA and JAMS, procedural costs are generally allocated to the parties at one or both of two stages. First, the rules set fees to be paid at the time a claim or counterclaim is filed (and sometimes at later points in the process, such as for a hearing). Second, the rules provide that the arbitrator may reallocate the fees between the parties in the arbitral award. The fees covered by the arbitration rules include both fees to be paid to the administrator and fees to be paid to the arbitrator. The parties also may incur attorneys’ fees.

In addition, the terms of an arbitration clause may address—beyond simply incorporating the cost rules of the administrator—how these different costs will be allocated between the parties. The arbitration clauses we studied contained three different types of cost provisions: first, provisions addressing the initial allocation of arbitration fees; second, provisions addressing the

allocation of arbitration fees in the award; and third, provisions addressing the award of attorneys' fees.

Some contractual allocation of costs—beyond the default rules of the administrator—was the norm in the clauses we studied. Only seven credit card clauses (10.6%, all from small issuers and covering a negligible market share), 14 checking account arbitration clauses (23.0%, covering 2.4% of arbitration-subject insured deposits), and five prepaid card arbitration clauses (9.8%, all from cards for which load data are not available) did not contain provisions altering the default arbitration cost provisions in the administrator's governing rules.

Many of the contracts, and in particular the checking account contracts, included general provisions on the allocation of costs and expenses that were *not* specific to arbitration costs. This document does *not* address such provisions or how they may interact with provisions specifically addressing arbitration costs.

PROVISIONS ADDRESSING THE INITIAL PAYMENT OF ARBITRATION FEES

In consumer arbitration, administrative and arbitrator fees are first assessed to the parties at filing. We refer to this as the “initial fee” allocation. Under the consumer arbitration rules of the AAA and JAMS, initial fees are predominantly allocated to the business rather than the consumer.¹⁰⁹ (We discuss the AAA's allocation in more detail in section 4.9.1.) In addition, the administrator's rules may bar the parties from contractually allocating a greater share of fees to the consumer. The AAA's rules, for example, do not permit it to administer a case in which the consumer is required by the applicable arbitration clause to pay more at filing than the maximum amounts stated in the AAA's consumer fee schedule.

Some credit card arbitration clauses provided that the issuer would pay at least some of the initial fees otherwise allocated to the consumer under the governing rules. This was true for 22 clauses (33.3%) representing 46.4% of arbitration-subject credit card loans outstanding. These clauses provided that the issuer would pay the fees either unconditionally, for good cause, or only if the administrator did not waive the fees, with the amount of the payment varying and sometimes limited to amounts in excess of court fees. A slightly smaller proportion of the credit

¹⁰⁹ *E.g.*, AAA, Supplementary Procedures for Consumer-Related Disputes, Rule C-8 (“Costs of Arbitration”) (Rules Effective Sept. 15, 2005; Fees Effective March 1, 2013); JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses, Minimum Standards of Procedural Fairness ¶ 7 (effective July 15, 2009).

card clauses (15 clauses, or 22.7%, covering 43.2% of arbitration-subject outstandings) stated that the issuer would advance at least some portion of the consumer’s arbitration fees under specified circumstances. Finally, eleven clauses used by small issuers (16.7% of clauses, covering a negligible share of outstandings) indicated that the issuer would consider paying or advancing the consumer’s arbitration fees, either on request or if the administrator does not waive the fees. These results are summarized in Table 6.

TABLE 6: ARBITRATION CLAUSE PROVISIONS ADDRESSING THE INITIAL PAYMENT OF ARBITRATION FEES 2012-13

	# of contracts	% of arbitration-subject account values
Company will pay some or all fees		
Credit cards	22 (33.3%)	46.4%
Checking accounts	27 (44.3%)	43.7%
Prepaid cards	18 (35.3%)	32.0%-41.8%
Company will advance some or all fees		
Credit cards	15 (22.7%)	43.2%
Checking accounts	8 (13.1%)	16.0%
Prepaid cards	7 (13.7%)	31.2%
Company will consider or advancing paying some or all fees		
Credit cards	11 (16.7%)	0.2%
Checking accounts	2 (3.3%)	0.4%
Prepaid cards	17 (33.3%)	27.0%-36.8%

Similarly, 44.3% of checking account arbitration clauses (43.7% of arbitration-subject insured deposits) provided that the institution would pay or reimburse some portion of the consumer’s share of the initial arbitration fees. Again, the prerequisites and amounts varied, with some contracts requiring good cause or that the administrator not waive the fees, and some only paying the amount in excess of court filing fees. A smaller number (8 clauses, or 13.1%, covering

16.0% of arbitration-subject insured deposits) provided that the institution would advance the arbitration fees under the specified circumstances. Two clauses (3.3%; 0.4% of arbitration-subject insured deposits) stated that the institution would consider paying the fees. These results are summarized above in Table 6.

Prepaid card arbitration clauses most commonly provided that the institution would consider advancing the consumer's share of arbitration fees (17 clauses, or 33.3%, covering between 27% and 36.8% of card loads); would advance the consumer's arbitration fees (7 clauses, or 13.7%, covering 31.2% of card loads); or would simply pay the consumer's arbitration fees, either in their entirety (14 clauses, or 27.5%, covering between 5.6% and 15.3% of card loads), to the extent the fees exceed filing fees in court (1 clause, 2.0%; no data on loads), up to \$500 (1 clause, 2.0%; no data on loads), or for claims under \$50,000 to \$75,000 (2 clauses, or 3.9%, covering 26.5% of card loads). These results are also summarized above in Table 6.

PROVISIONS ADDRESSING THE ALLOCATION OF ARBITRATION FEES IN THE AWARD

The rules of arbitration administrators may permit the arbitrator to allocate all arbitration fees between the parties in the award, including reallocating initial fees from one party to the other. As we explain further in section 4.9.1, prior to March 1, 2013, the default AAA rules provided for such reallocation. (From that date, however, the AAA rules restrict reallocation.¹¹⁰) The JAMS Streamlined Arbitration Rules also allow for such reallocation, and the JAMS Minimum Standards of Procedural Fairness for consumer arbitrations do not appear to restrict the practice, except for cases in which California law so requires.¹¹¹ Our review in this section uses the situation under the JAMS rules and the AAA rules in force from 2010 through 2012 as the baseline for comparison.

¹¹⁰ The new fee schedule, effective March 1, 2013, provides that “[a]rbitrator compensation ... and administrative fees (which include Filing and Hearing Fees) are not subject to reallocation by the arbitrator(s) except pursuant to applicable law or upon the arbitrator’s determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.” AAA, Supplementary Procedures for Consumer-Related Disputes, Rule C-8. The credit card contracts studied all predate the revision to the AAA rules. The checking account and prepaid card contracts also may not reflect the revision to the rules.

¹¹¹ JAMS Streamlined Arbitration Rules & Procedures, *supra* note 88, Rule 19(e); JAMS Minimum Standards of Procedural Fairness, *supra* note 109, ¶ 8 (“In California, the arbitration provision may not require the consumer to pay the fees and costs incurred by the opposing party if the consumer does not prevail.”).

Arbitration clauses took noticeably different approaches to the allocation of arbitration fees in the arbitrator's award.¹¹² First, a number of credit card arbitration clauses (23 clauses, or 34.8%, covering 21.8% of arbitration-subject credit card loans outstanding) expressly permitted the arbitrator to shift the payment of arbitration fees from the issuer to the consumer, as the default AAA and JAMS rules already allowed.¹¹³ All but one of the clauses permitted the converse as well—shifting fees from the consumer to the issuer. Second, a smaller number (5 clauses, or 7.6%; 17.0% of arbitration-subject credit card loans outstanding) expressly precluded such shifting arbitration fees from the issuer to the consumer. Third, others (18 clauses, or 27.3%; 51.5% of arbitration-subject credit card loans outstanding) affirmatively permitted the consumer to recover arbitration fees from the issuer. Five of these clauses (covering 4.3% of arbitration subject credit card loans outstanding) also precluded cost-shifting to the consumer, while the rest were silent on reallocation to the consumer. While clauses in all three categories would allow the arbitrator to shift fees from the consumer to the company, only clauses in the second category (and five of the clauses in the third category) offer the consumer any contractual protection against the possibility of an adverse reallocation of costs at the award stage.

Checking account arbitration clauses contained similar provisions. Almost 25% of the clauses (15 of 61, covering 16.9% of arbitration-subject insured deposits) expressly permitted the arbitrator to shift arbitration costs to the consumer (and the converse as well), in line with the default rules. Just over 11% of the clauses (7 of 61, covering 7.9% of arbitration-subject insured deposits) precluded cost-shifting back to the consumer. Finally, 14.8% of clauses (9 of 61, but covering 28.0% of arbitration-subject insured deposits) expressly permitted the consumer to recover arbitration fees from the institution, but only one such clause (covering 0.4% of arbitration-subject insured deposits) precluded the arbitrator from shifting costs to the consumer.

The pattern also was similar for prepaid cards. Nine prepaid card arbitration clauses (17.6%; no data on card loads) permitted fees to be shifted to consumers (with all but one permitting the converse as well), while three clauses (5.9%; 26.5% of arbitration-subject prepaid card loads)

¹¹² Some clauses clearly covered both the administrator's fees and the arbitrator's fees, but most were ambiguous about whether both types of fees are covered or only the administrator's fee.

¹¹³ Only one such clause (for a small issuer) requires that a losing consumer pay the issuer's arbitration costs. The rest permitted the arbitrator to so decide but do not require the arbitrator to do so.

precluded such fee shifting. Many more prepaid arbitration clauses (22 clauses, or 43.1%; 57.9%-67.7% of arbitration-subject prepaid card loads) affirmatively permitted prevailing consumers to recover their arbitration fees, although without precluding cost-shifting back to the consumer. These results are summarized in Table 7.

TABLE 7: ARBITRATION CLAUSE PROVISIONS ADDRESSING ALLOCATION OF ARBITRATION FEES IN THE AWARD 2012-13

	# of contracts	% of arbitration-subject account values
Permits shifting issuer fees to consumer		
Credit cards	23 (34.8%)	21.8%
Checking accounts	15 (24.6%)	16.9%
Prepaid cards	9 (17.6%)	No data
Bars shifting issuer fees to consumer		
Credit cards	5 (7.6%)	17.0%
Checking accounts	7 (11.5%)	7.9%
Prepaid cards	3 (5.9%)	26.5%
Permits shifting consumer fees to issuer		
Credit cards ¹¹⁴	18 (27.3%)	51.5%
Checking accounts ¹¹⁵	9 (14.8%)	28.0%
Prepaid cards ¹¹⁶	22 (43.1%)	57.9%-67.7%

¹¹⁴ Five of these credit card arbitration clauses, covering 4.3% of arbitration-subject credit card loans outstanding, also precluded shifting the issuer's arbitration fees to the consumer.

¹¹⁵ One of these checking account arbitration clauses, covering 0.4% of arbitration-subject insured deposits, also precluded shifting the issuer's arbitration fees to the consumer.

¹¹⁶ None of these prepaid card arbitration clauses precluded shifting the issuer's arbitration fees to the consumer.

PROVISIONS ADDRESSING THE AWARD OF ATTORNEYS' FEES

A significant share of credit card arbitration clauses directed that the parties bear their own attorneys' fees unless the law requires otherwise (22 clauses, or 33.3%; 45.5% of credit card loans outstanding). This was also true for a smaller share of checking account contracts (9 clauses, or 14.8%; but 37.6% of arbitration-subject insured deposits) and prepaid card contracts (3 clauses, or 5.9%; no load data). One prepaid card (which covers 26.5% of arbitration-subject card loads in our sample) waived any right of the company to recover attorneys' fees from the consumer.

Significant shares of arbitration clauses across all three markets, however, did not address attorneys' fees. This was true for 18 credit card clauses (27.3%, covering 21.4% of arbitration-subject credit card loans outstanding), 22 checking account clauses (36.1%, covering 27.2% of arbitration-subject insured deposits), and 35 prepaid clauses (68.6%, covering 73.3% of arbitration-subject card loads). When the arbitration clause does not address the issue, the arbitrator may award attorney's fees when permitted by the agreement or applicable law.¹¹⁷

Five credit card arbitration clauses (7.6%, from small issuers representing a negligible market share) directed or permitted the arbitrator to award attorneys' fees to the prevailing party, which presumably would have permitted the issuer to recover its attorneys' fees from the consumer when it prevailed, and also would have permitted a prevailing consumer to recover his or her attorneys' fees. Five prepaid arbitration clauses (9.8%; no load data) permitted an award to a prevailing party, either the consumer or the company. Three checking account clauses (4.9%; 1.0% of arbitration-subject insured deposits) would have permitted an award to the prevailing party, consumer or company.

A number of the remaining clauses permitted or directed the award of attorneys' fees to a prevailing consumer. Five credit card clauses (7.6%, covering 10.2% of arbitration-subject credit card loans outstanding) directed the issuer to pay the consumer's attorneys' fees if the consumer prevails. Other credit card clauses expressly authorized (but did not require) the arbitrator to award attorneys' fees to consumers, either if the consumer prevailed (1 clause, or 1.5%; 15.1% of arbitration-subject credit card loans outstanding), if the amount awarded was greater than the

¹¹⁷ AAA, Commercial Arbitration Rules, Rule R-43(d)(ii) (effective June 1, 2009); JAMS Streamlined Arbitration Rules, *supra* note 88, Rule 19(f).

issuer's last settlement offer (1 clause, or 1.5%; 0.0% of arbitration-subject credit card loans outstanding), or if the arbitrator so determined (1 clause, or 1.5%; 0.2% of arbitration-subject credit card loans outstanding).

Eleven checking account clauses (18.0% of clauses; 18.1% of arbitration-subject insured deposits) provided that the arbitrator would award, and another two clauses (3.3% of clauses; 2.4% of arbitration-subject insured deposits) might award attorneys' fees to a prevailing consumer. An additional three checking account clauses directed (4.9%; 2.5% of arbitration-subject insured deposits), and another permitted (1.6%; 0.5% of arbitration-subject insured deposits), the arbitrator to award the consumer attorneys' fees if the award exceeded the institution's last written settlement offer, while another directed the award of double attorneys' fees under those circumstances (1.6%; 0.2% of arbitration-subject insured deposits). One prepaid clause (no load data) permitted the arbitrator to award attorneys' fees to the consumer.

TABLE 8: ARBITRATION CLAUSE PROVISIONS ADDRESSING THE AWARD OF ATTORNEYS' FEES IN THE AWARD 2012-13

	# of contracts	% of arbitration-subject account values
Parties bear own attorneys' fees		
Credit cards	22 (33.3%)	45.5%
Checking accounts	9 (14.8%)	37.6%
Prepaid cards	3 (5.9%)	No load data
Attorneys' fees to prevailing party		
Credit cards	5 (7.6%)	0.0%
Checking accounts	3 (4.9%)	1.0%
Prepaid cards	5 (9.8%)	No load data
Attorneys' fees to prevailing consumer		
Credit cards	8 (12.1%)	25.5%
Checking accounts	18 (29.5%)	23.7%
Prepaid cards	1 (2.0%)	No load data

No provision		
Credit cards	18 (27.3%)	21.4%
Checking accounts	22 (36.1%)	27.2%
Prepaid cards	35 (68.6%)	73.3%

3.4.11 Contingent minimum award recoveries

The AT&T arbitration clause at issue in *Concepcion* provided that a customer would receive a minimum recovery of \$10,000 if the customer was awarded more in arbitration than the amount of the last written settlement offer made by AT&T.¹¹⁸ Contingent minimum recovery provisions were uncommon in the arbitration clauses that we studied, although they occurred more often in checking account arbitration clauses than in credit card or prepaid card arbitration clauses. We did not identify any such terms in contracts without arbitration clauses.

None of the arbitration clauses in the prepaid card contracts in the sample included a contingent minimum recovery provision. Only three (4.5%) of the credit card arbitration clauses studied—representing 2.3% of arbitration-subject credit card loans outstanding in the sample—included such a provision, with the contingent amount ranging from \$5,100 to \$7,500. By comparison, ten arbitration clauses (16.4%) in the checking account sample—representing 10.5% of arbitration-subject insured deposits in the sample—included such a provision. For these ten checking account contracts, the contingent minimum recoveries generally ranged from \$2,500 to \$10,000.¹¹⁹

¹¹⁸ See 131 S. Ct. at 1744 & n.3.

¹¹⁹ Most of the provisions that we identified make the minimum recovery contingent on the arbitrator awarding the consumer the relief sought, or greater relief, after the institution refuses to provide such relief. A smaller share use a different contingency: whether the arbitrator awards relief equal or in excess of the value of the company's last settlement offer.

3.4.12 Disclosures

Most of the arbitration clauses described certain differences between arbitration and litigation in court. They typically highlighted some combination of four differences. First, no jury trial is available in arbitration. Second, discovery typically is more limited in arbitration than in civil court litigation. Third, appeal rights are more limited in arbitration than for decisions of trial court judges in civil court cases. Fourth, when parties have agreed to arbitrate, they cannot participate in class actions in court.¹²⁰ Often this descriptive language was capitalized or in boldfaced type.

Of the credit card arbitration clauses studied, 49.3% (covering 40.8% of arbitration-subject credit card loans outstanding) identified all four procedural differences; only a number of small issuers identified none. Almost every credit card arbitration clause indicated that the consumer would not have a right to a jury trial in arbitration (92.5% of clauses, covering 99.7% of arbitration-subject credit card loans), and slightly more (94.0% of clauses, covering 99.9% of arbitration-subject credit card loans) stated that for claims subject to arbitration the consumer could not be party to a class action in court. Over half of the clauses mentioned more limited rights to discovery and appeal.

The checking account arbitration clauses studied contained fewer disclosures. Only 27.9% of clauses (covering 19.0% of arbitration-subject insured deposits) identified all four procedural differences, while 24.6% of clauses (although again covering smaller issuers) identified none. The most common difference disclosed was the lack of a jury trial (75.4% of clauses, covering 98.1% of arbitration-subject secured deposits). The majority (60.7%, covering 67.5% of arbitration-subject insured deposits) stated that for claims subject to arbitration, the consumer could not be part of a class action in court. Around 40% noted limited discovery and appeal rights.

The disclosures in the prepaid card arbitration clauses were more like those in credit card clauses, with 41.2% (covering from 27.0% to 36.8% of arbitration-subject card loads) disclosing

¹²⁰ The type of disclosure provisions discussed here are not the same as the no-class-arbitration provisions examined earlier. See section 3.4.5. The disclosure provision explains to the consumer that by agreeing to arbitration, the consumer will not be able to participate in a class action in court. The no-class-arbitration provision provides that any arbitration proceeding will be conducted on an individual basis and not a class basis. Most contracts included both, but a few contracts with no-class-arbitration provisions did not make the type of disclosure considered here.

all four procedural differences and only 7.8% (with no card load data available) disclosing none. Almost all (92.2% of clauses; 100% of arbitration-subject card loads) stated that no jury trial was available, most (88.2% of clauses; 100% of arbitration-subject card loads) noted the inability to participate in a class action in court, and many highlighted limited discovery (66.7% of clauses; 42.3% of arbitration-subject card loads) and limited appeal rights (47.1% of clauses; 57.9%-67.7% of arbitration-subject card loads).

3.5 Clause changes

The data presented so far are for arbitration clauses as of the end of 2012 (for credit card contracts) or as of the third quarter of 2013 (for checking account and GPR prepaid card contracts). This section examines whether the inclusion of arbitration clauses in consumer financial services contracts has changed since December 31, 2010, shortly before the Supreme Court's April 2011 decision in *Concepcion*.¹²¹ In *Concepcion*, the Court upheld a no-class-arbitration provision in an arbitration clause against a state law unconscionability challenge, overriding a number of state and federal court decisions upholding state laws that had invalidated such provisions.¹²² Following *Concepcion*, several scholars and commenters suggested that companies would inevitably include arbitration clauses with no-class-arbitration provisions in all their consumer contracts¹²³ or would revise their arbitration clauses in line with

¹²¹ See 131 S. Ct. at 1753.

¹²² See, e.g., *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49 (1st Cir. 2007); *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007); *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007); *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88 (N.J. 2006).

¹²³ E.g., Ian Millhiser, *Supreme Court Nukes Consumers' Rights In Most Pro-Corporate Decision Since Citizens United*, ThinkProgress: Justice (Apr. 27, 2011) ("After *Concepcion*, it is only a matter of time before nearly every credit card provider, cell phone company, mail-order business or even every potential employer requires anyone who wants to do business with them to first give up their right to file a class action.") <http://thinkprogress.org/justice/2011/04/27/176997/scotus-nukes-consumers>. But see Peter B. Rutledge & Christopher R. Drahozal, "Sticky" Arbitration Clauses?: *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. ____ (forthcoming 2014) (finding that most franchisors have not switched to arbitration after *Concepcion* and explaining that "[b]y using an arbitration clause, businesses do more than simply contract out of class actions: they contract for a bundle of dispute resolution services, including, for example, a very limited right to appeal. For businesses that perceive themselves as unlikely to be sued in a class action (and hence to receive little benefit from an arbitral class waiver), the other services bundled with the waiver of class actions ... may discourage

the case.¹²⁴ We focus on changes in the incidence in contracts of arbitration clauses or clause features; we do not address changes in the manner and frequency with which clauses are applied that may result from intervening legal decisions such as *Concepcion* or *Rent-A-Center*.

Because of data availability, we focus here on changes in the inclusion of arbitration clauses in credit card contracts. Only limited data on changes in checking account contracts since *Concepcion* are available, but those data reveal a noticeable increase in the inclusion of arbitration clauses among large banks since mid-2012. We have no data on changes in the inclusion of arbitration clauses in prepaid card contracts since *Concepcion*.

We also note that many companies—particularly smaller entities—use standard forms acquired from a form provider, rather than preparing their own customized form. At least 83 of the 141 small to mid-sized banks (58.9%) in the checking account sample used some version of a standard form prepared by a single form provider. At present, that standard form does not include an arbitration clause, although the form company does offer an optional free-standing arbitration clause.

3.5.1 Credit cards

The incidence of arbitration clauses in credit card contracts has increased since *Concepcion*, but only slightly. Examining the issuers in our sample that have agreements available for the entire period from 2010-2012, the number of issuers using arbitration clauses increased from 57 as of year-end 2010, to 58 as of year-end 2011, to 59 as of year-end 2012.¹²⁵ A total of five credit card issuers in our sample have adopted arbitration clauses since *Concepcion*, while three issuers that previously used arbitration clauses stopped using them, for a net increase of two. The dollar amount of credit card loans outstanding subject to arbitration clauses has increased somewhat more—from 47.2% of credit card loans outstanding as of year-end 2010 to 50.1% as of year-end

them from using an arbitration clause. In addition, even standard form contracts might be sticky—i.e., resistant to change even if change might be in the business’s best interest.”).

¹²⁴ See Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 844-45 (2012).

¹²⁵ A review of the credit card contracts available on the CFPB web page reveals no additional issuers switching to arbitration between December 31, 2012, and June 30, 2013. We have not yet reviewed the clauses for changes in features over this period.

2012.¹²⁶ Of course, 86.8% of credit card loans outstanding without arbitration clauses were subject to the *Ross* settlement during this period, which limited the extent of any shift toward arbitration after *Concepcion*.¹²⁷ Of the five issuers that have switched to arbitration since *Concepcion*, all included no-class-arbitration provisions, four of five included delegation clauses (the other excepted class issues from its delegation clause), and none had a minimum recovery provision.

Of the issuers that have used arbitration clauses for the entire period from 2010-2012, only a small number have changed provisions in their clauses since *Concepcion*. The only change in the inclusion of no-class-arbitration terms by those issuers was the deletion by one issuer of language that excluded California accounts from its class waiver. The inclusion of anti-delegation clauses by those issuers increased from 33.6% of arbitration-subject credit card loans outstanding as of December 31, 2010, to 42.6% as of December 31, 2012.¹²⁸ Finally, in 2012, two of these issuers added contingent minimum recovery provisions to their existing arbitration clauses that were similar to those in the clause at issue in *Concepcion*. Even so, the market share covered by such provisions—some 2.3% of arbitration-subject credit cards loans outstanding—remains small.

¹²⁶ The five issuers switching to arbitration contributed only a marginal amount to the increase, accounting for 0.2% of credit card loans outstanding. Changes in the amount of credit card loans outstanding of existing users of arbitration clauses explain almost all of the increase.

¹²⁷ See *supra* text accompanying notes 51 to 52. It is possible, of course, that one or more of the settling defendants in *Ross* might have removed their credit card arbitration clauses even absent *Ross*. The *Ross* allegations did not apply to checking accounts, but Bank of America removed its arbitration clause from checking accounts in August 2009. See Jonathan Stempel, *Bank of America ends arbitration of card disputes*, REUTERS.COM (Aug. 14, 2009), <http://www.reuters.com/article/2009/08/14/us-bankofamerica-arbitration-sb-idUSTRE57D03E20090814>. On the other hand, two issuer defendants did not agree to settle *Ross*, maintained their clauses, and together with another issuer in a parallel proceeding, took the matter through trial. As this presentation was being finalized, the case remained pending against all three issuers.

¹²⁸ Two issuers replaced their delegation clauses with anti-delegation clauses, two replaced class exceptions with anti-delegation clauses, one removed the class exception from its delegation clause, while one added a new delegation clause, though it was still subject to a class exception.

3.5.2 Checking accounts

By comparison to credit card contracts, only limited data are available on changes in checking account contracts since *Concepcion*. We compare the contracts used in the Pew Charitable Trusts study of checking account contracts—collected from June to August 2012—to the contracts we collected just over a year later – from August to September 2013.¹²⁹ Thus, the data cover only a portion of the period since *Concepcion*. Any changes to checking account contracts prior to summer 2012 will not be reflected in the findings described below.¹³⁰

The sample consists of 88 large financial institutions (banks and credit unions) as to which the sample in the Pew study overlaps with the sample used by the Bureau.¹³¹ As of summer 2012, 35 of the 88 institutions (39.8%) used arbitration clauses in their checking account contracts. As of summer 2013, one year later, 42 of 88 (47.7%) used arbitration clauses. Eight banks and one credit union switched to arbitration during that one-year period, while two banks switched away from arbitration. The eight banks switching to arbitration constituted 9.2% of all arbitration-subject insured deposits in the large bank sample. The credit union became the largest credit union using an arbitration clause, accounting for over one-third of all arbitration-subject insured deposits at credit unions in the sample as of year-end 2012. Of the institutions that switched to arbitration within the past year, six included delegation clauses, two had anti-delegation provisions, and one had neither an anti-delegation nor delegation provision; all but one had a no-class-arbitration provision; and none had a contingent minimum recovery provision.

As with credit card contracts, only a small number of institutions have changed the terms of their existing arbitration clause within the past year. Of the institutions that had arbitration clauses in both 2012 and 2013, one adopted a delegation clause, one adopted an anti-delegation clause, and a third added language that delegates most issues of enforceability to the arbitrators;

¹²⁹ Pew Charitable Trusts, *supra* note 37, at 14. We describe our sourcing of checking account contracts in Appendix A.

¹³⁰ For example, press reports indicate that Umpqua Bank adopted an arbitration clause in January 2012, prior to the period for which we have data here. See Brent Hunsberger, *Umpqua Bank Joins Wells Fargo and Chase in Requiring Customers to Arbitrate Disputes, Barring Class Actions*, THE OREGONIAN (Jan. 23, 2012), http://www.oregonlive.com/business/index.ssf/2012/01/umpqua_bank_joins_wells_fargo_1.html.

¹³¹ Pew was unable to obtain agreements for eight banks in its sample, while four of the banks in the Pew sample (based on total deposits) are not in the sample used here (based on total insured deposits).

its clause previously stated only that class issues were to be decided by a court and was silent on the other issues. Two of those institutions adopted no-class-arbitration provisions, and one added a contingent minimum recovery provision to its arbitration clause.

4. Incidence and typology of consumer arbitration filings

This section presents preliminary results from our review of 1,241 credit card, checking and payday loan consumer disputes filed with the American Arbitration Association (“AAA”) from the start of 2010 through the end of 2012.¹³² Based on our review of AAA consumer arbitration files, these were the only consumer disputes about any of these three products filed with the AAA during that period.

4.1 Data sources

4.1.1 AAA case data

Our review used electronic case records that the AAA voluntarily provided to the Bureau (the “AAA Data”). The AAA began using its electronic case record system from the beginning of 2010 for all filings administered as consumer arbitrations. Under the AAA rules—in this case the AAA Supplementary Procedures for Resolution of Consumer-Related Disputes—a dispute between a consumer and a company is administered as a consumer arbitration if it meets a number of criteria. First, the business must have a “standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices.” Second, the product at issue must be for personal or

¹³² We identified four filings relating to prepaid or gift cards. They are not included in the 1,241 because we considered that number of cases too small to include as a separate product market in this presentation.

household use.”¹³³ (If there is no applicable arbitration clause in the contract between the consumer and company, the consumer arbitration rules may still apply if the parties agree to submit the dispute to AAA.¹³⁴) As a result, an AAA “consumer arbitration” is not necessarily one filed by a consumer. So long as the criteria described above apply, companies can file consumer arbitrations against consumers.

The AAA agreed to provide to the Bureau all case files from its electronic case record system for consumer arbitrations filed from January 1, 2010 through the end of 2012. The material volunteered by the AAA covers class arbitrations and non-class arbitrations; filings that went no further than an initial filing, as well as those that did advance to formal initiation by the AAA and beyond; and all arbitration filings that were submitted as consumer arbitrations regardless of subject matter.

To date, our review of the AAA Data has: (1) identified consumer arbitration filings that cover credit card, checking account, payday loan, or prepaid disputes; and (2) extracted data points for the first three of these categories. This presentation, therefore, does not cover data about AAA consumer arbitrations outside of these particular product markets. We refer to the AAA Data that covers these three product markets for filings between January 1, 2010 and December 31, 2012, as the “AAA Case Data.”

Our review to this point was limited to AAA files. This is because we have not secured data from JAMS and, indeed, JAMS may not have data of the same duration as the AAA. Although we intend to continue to explore with JAMS the possibility of obtaining its data, we do not view the absence of such data as materially impacting our analysis because, during the 2010-12 period under review, the AAA was and remains the largest administrator of consumer arbitration in the United States.¹³⁵ JAMS, the other leading consumer arbitration administrator, has reported that

¹³³ AAA, Consumer-Related Disputes Supplementary Procedures C-1(a) (effective Sept. 15, 2005). The AAA reserves discretion whether or not to apply the consumer arbitration rules, with the parties being free to raise disputes about their application directly to the arbitrator. *See id.*

¹³⁴ *See id.* Rule C-3 (effective Sept. 15, 2005).

¹³⁵ That was not true until July 2009, when the National Arbitration Forum (“NAF”) settled a consumer fraud suit brought by Minnesota Attorney General Lori Swanson. Until that point, NAF was almost certainly administered the largest caseload of consumer arbitrations in the U.S. In the settlement, however, it agreed to stop administering new consumer arbitrations and exited the consumer arbitration business altogether.

it handles “at most” a few hundred consumer cases every year.¹³⁶ In contrast, the AAA Data contain approximately 7,000 consumer arbitration filings over three years. (This number is not limited to consumer financial matters.¹³⁷) Although many of these cases were outside the scope of our review, these numbers provide some indication of the relative roles of the AAA and JAMS.

Moreover, during the time period under study, the AAA was the largest provider of consumer arbitration services with respect to consumer financial disputes within the scope of our current review. As discussed in section 3.4.3 above, almost all the credit card arbitration clauses studied provide for arbitration before the AAA alone (48.5%) or before a choice of the AAA and other administrators (a further 34.8%). For checking accounts, the picture is the same. Banks with an arbitration clause either specify (91.8%) or require (55.7%) the AAA to be used if arbitration were elected by either party. While JAMS is a permitted option for 40.1% of credit card agreements and for 34.4% of checking account agreements, it is only once the sole option for checking account agreements and only three times the sole option for credit card agreements.¹³⁸

4.1.2 Existing empirical studies and data

Although a relatively large number of empirical studies have examined employment and securities arbitration, relatively few such studies have examined consumer arbitration in detail.¹³⁹ Drahozal and Zyontz reviewed AAA consumer arbitrations that resulted in an

¹³⁶ See Jean Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. U. L. REV. 87, 99 n.68 (2012) (“*Mandatory Binding Arbitration Clauses*”) (citing Jay Welsh, JAMS Executive Vice President and General Counsel.) There is general agreement that the AAA and JAMS are the leading consumer arbitration administrators. See, e.g., ABA, CBA, & FSR RFI Comment at 3.

¹³⁷ It covers all consumer arbitration filings, regardless of subject matter. It also includes filings that were not perfected for one or more of the reasons discussed at section 4.2.1 below. Approximately one-third of the filings were not perfected.

¹³⁸ By market volume subject to arbitration, the AAA is specified still more frequently. See section 3.4.3.

¹³⁹ Part of the reason may be that “all arbitration awards in the securities industry are publicly available.” David B. Lipsky et al., *The Effect of Gender on Awards in Employment Arbitration Cases: The Experience in the Securities Industry*, 52 INDUSTRIAL RELATIONS: A JOURNAL OF ECONOMY AND SOCIETY 314, 317 (2013). Securities industry arbitration encompasses claims involving customers and brokers as well as employment claims involving employees and brokerage firms. These arbitrations are administered by the Financial Industry Regulatory Authority (“FINRA”). See *id.* at 322.

arbitrator’s “award” during nine months of 2007.¹⁴⁰ The AAA Case Data available to us is significantly broader than the data covered by this earlier study. It covers a much longer period, and it is not limited to case files for awarded cases. A number of summary reviews published by the AAA covered all administered AAA consumer arbitrations from 2006 and a sample from 2007.¹⁴¹

Empirical review of non-AAA consumer arbitrations has generally used NAF data. A number of studies have used public data in California for NAF consumer arbitrations from 2003 through early 2007.¹⁴² Public Citizen identified a set of roughly 34,000 NAF arbitrations for this period, all but 118 of which companies filed against consumers, rather than the other way around.¹⁴³ Almost all the cases were described by NAF as “collection” cases. Ernst & Young carried out a review of a sample of NAF consumer-filed arbitrations from 2000 through 2003.¹⁴⁴ NAF also

¹⁴⁰ See Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25:4 OHIO ST. J. ON DISP. RES. 843, 845 (2010) (“*Empirical Study*”) (noting relative lack of studies of consumer arbitration). This study presented results primarily from analyzing 301 consumer arbitrations closed by an award between April 2007 and December 2007. See *id.* at 867-71 (describing data and methodology). This study was part of a broader research project supported by the Searle Civil Justice Institute, which was then associated with Northwestern University School of Law. Drahozal and Zyontz used the same AAA data for a follow-on study that compared debt collection claims by companies in AAA consumer arbitrations with debt collection claims in federal court and in state court proceedings in certain Virginia and Oklahoma jurisdictions. See Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L. J. 77 (2011) (“*Creditor Claims*”).

¹⁴¹ See AAA, Statement of the AAA Before the Constitution Subcomm. of the Senate Comm. on the Judiciary (2007) and Analysis of the AAA’s Consumer Arbitration Caseload (2007), both available at the AAA’s website, www.adr.org.

¹⁴² Pursuant to section 1281.96 of the California Code of Civil Procedure law, arbitration providers are required to disclose a number of data points about consumer and employment arbitrations in California. See Cal. Civ. Proc. Code § 1281.96. A number of other jurisdictions now have similar requirements. The AAA does not limit its public disclosures to California arbitrations, but discloses information on consumer arbitrations throughout the United States. Because we have access to AAA electronic case records, however, we have not relied for our review on these public data. In addition, as discussed in section 4.2 below, our review covers all consumer arbitration filings with the AAA, whereas the publicly available data only reaches disputes that the AAA actually processes.

¹⁴³ Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sept. 2007), <http://www.citizen.org/documents/ArbitrationTrap.pdf>.

¹⁴⁴ Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2004), <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf>. This study also briefly reviewed certain public data on AAA arbitrations available in California.

published at least one review of its own case data.¹⁴⁵ Finally, data about consumer arbitration can sometimes be obtained from public litigation proceedings. In a number of court cases, companies or other parties have proffered evidence about arbitration.

4.2 Case incidence

4.2.1 Overall

For 2010 through 2012, excluding class cases, we identified 1,241 AAA non-class consumer arbitration filings about credit cards, checking account, and payday loans.¹⁴⁶ The cases covered the entire range of arbitral procedure, from cases filed with the AAA but never processed (for one of the reasons noted below) to cases decided by the arbitrator in a written award.¹⁴⁷

There are several reasons for an AAA consumer arbitration to proceed no further than filing. First, there may be no pre-dispute arbitration clause between the parties, and one or other party may not agree to arbitrate post-dispute. Second, the parties may settle the dispute before the matter proceeds further. Third, the filing party may abandon the claim before the matter proceeds further. Fourth, the AAA may refuse to accept the dispute for one of a number of reasons: if the case is inconsistent with the terms of its moratorium on certain debt collection disputes, which we describe more fully below; if the company fails to comply with the AAA's Due

¹⁴⁵ Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNSEL (July 2006) (covering NAF cases from 2003 and 2004), <http://www.metrocorpcounsel.com/articles/6988/same-result-court-more-efficiently-comparing-arbitration-and-court-litigation-outcomes>.

¹⁴⁶ In this time period, there were only two class arbitration filings before the AAA for these three product markets. (Claimants in these two cases sought to represent “thousands” of consumers.) One reason for the lack of class arbitration filings may be that the applicable credit card and checking account arbitration clauses almost universally prohibit class arbitration, as described in section 3.4.5. (That may also be the case for payday lenders, but we do not yet have significant data on the point. The Bureau is not aware, however, of any arbitration clause in the consumer financial area that expressly permits class arbitration.) This presentation only reviews non-class arbitration filings.

¹⁴⁷ While our focus in this presentation is on the number and type of consumer disputes filed with the AAA, we will necessarily be looking at a smaller set of disputes when we later examine awards in arbitrated disputes. We will also look to see whether particular types of cases tend to end at specific stages, and comparing that to disposition in the court system.

Protocol by failing to pay the required filing and administrative fees; if the arbitration clause violates the terms of the Due Process Protocol, and the company is not willing to waive the violative terms for purposes of the arbitration; if the company has previously refused to comply with the Due Process Protocol; or for a claimant's failure to meet other filing requirements.

The Bureau recognizes that the number of filed arbitrations is not a metric that can be looked at in isolation. We do not know the numbers of credit cardholders, checking account holders, or payday borrowers with potentially viable legal claims. With the exceptions noted below, we do not yet know the number of claims filed in court proceedings.¹⁴⁸ Plainly, the number of arbitrations was low relative to the total populations using these products. Using the Bureau's Consumer Credit Panel, which provides a nationally representative, random sample of de-identified credit records procured from a large, national consumer reporting agency, we estimate that, as of the end of 2012, there were approximately 160 million credit cardholders in the United States. On the assumption that the number of cardholders and the volume of credit card loans outstanding are proportionate, when combined with our incidence data from section 3.2.1, this data indicate that around 80 million cardholders were subject to arbitration clauses as of the end of 2012. Data from the Census and from the Survey of Consumer Finance collectively suggest that in 2010 about 108 million U.S. households held one or more transaction accounts, a category that includes consumer checking accounts.¹⁴⁹ Combining data from the Census and the FDIC's National Survey of Unbanked and Underbanked Households suggests that in 2011, around 105.1 million households had at least one checking or savings account.¹⁵⁰ Again on the assumption that the number of checking accounts is proportionate to the volume of insured

¹⁴⁸ Of course, the litigation numbers may be impacted up or down by the presence of arbitration clauses, making a direct comparison hard. In addition, there are limits on the availability of state court case records.

¹⁴⁹ According to the Survey of Consumer Finances, 92.5% of families had at least one transaction account in 2010. See Jesse Bricker, Arthur B. Kennickell, Kevin B. Moore, and John Sabelhaus, *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, Federal Reserve Bulletin, vol. 98, no 2 (Feb. 2012), Table 6B at page 28. In this study, "family" is comparable to the Census definition of "household." *Id.* at 3. According to the Census, there were 116,716,331 U.S. households in 2010, which means that approximately 108 million households had at least one transaction account in that year. See U.S. Census Bureau; 2010 Demographic Profile Data, Profile of General Population and Housing Characteristics: 2010, Table DP-1.

¹⁵⁰ In 2011, according to the FDIC's survey, there were 9.9 million households without either a checking or a savings account. See Federal Deposit Insurance Corporation, *2011 FDIC National Survey of Unbanked and Underbanked Households* at 510 (2012). The Census identifies 115 million households in that year. See U.S. Census Bureau; 2011 American Community Survey 1 Year Estimates, Population and Housing Narrative Profile: 2011, Table NP01.

deposits, it appears that tens of millions of households are subject to arbitration on one or more checking accounts.¹⁵¹ Finally, the FDIC also estimates that around 2 million households use payday loans annually.¹⁵²

FIGURE 4: NUMBER OF AAA CONSUMER ARBITRATIONS BY PRODUCT 2010-12

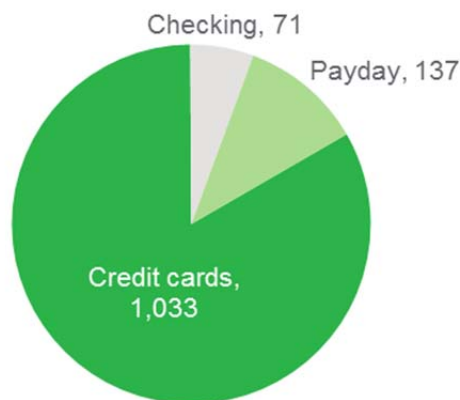


Figure 4 summarizes the breakdown of the 1,241 filings by product market: 1,033 were credit card disputes; 71 were checking account disputes; and 137 were payday loan disputes.¹⁵³ The

¹⁵¹ We do not offer a more specific estimate for checking accounts because: (a) these account data cover savings and other transaction accounts; (b) our overall incidence estimate from section 3.2.2 is specific to bank use of arbitration clauses for checking accounts, and thus does not reflect the incidence of credit union use; and (c) the section 3.2.2 incidence estimate uses 2012 and 2013 data, whereas the account data offered here is for 2010 and 2011.

¹⁵² Federal Deposit Insurance Corporation, *Addendum to the 2011 FDIC National Survey of Unbanked and Underbanked Households Use of Alternative Financial Services* (2013) 48. The Pew Charitable Trusts recently estimated that around 12 million individuals use payday loans every year. See Pew Charitable Trusts, *Who Borrows, Where They Borrow, and Why: Payday Lending in America* (2012) 4.

¹⁵³ For purposes of this analysis, we have included in the category of “payday loan” cases a number of arbitration filings involving credit service organizations (“CSOs”). Approximately 23 states allow credit service organizations (CSOs) to broker loans. See <http://www.responsiblelending.org/payday-lending/policy-legislation/states/CRL-CSO-Issue-Brief-FINAL.pdf>. In some of these states, CSOs can charge unlimited fees to broker loans. See http://forabettertexas.org/images/EO_2013_09_StateofPayday.pdf. Although CSO statutes generally contemplate that a CSO will broker a loan with a third party lender, there are claims that payday lenders pose as CSOs to evade state interest rate caps and make a larger profit on each loan. See <http://www.responsiblelending.org/payday-lending/policy-legislation/states/CRL-CSO-Issue-Brief-FINAL.pdf>. To account for this possibility, arbitration

average annual number of disputes, therefore, was 344 for credit card, 24 for checking account, and 46 for payday loans.

4.2.2 Types of consumer arbitration filings

Prior analyses of arbitration cases have distinguished company-filed and consumer-filed cases. Company-filed cases were generally debt collections arbitrations in which the company sought to collect debt or alleged debt from consumers. At least for some creditors for some period of time, debt collection arbitration took the place of debt collection litigation. The available data indicates that company-filed debt collection actions were the predominant form of consumer arbitration cases prior to 2010, with a number of specific credit card issuers making significant use of debt collection arbitration before NAF.¹⁵⁴

Our analysis of the AAA records persuades us that it is important to identify debt collection arbitrations, but that the category of debt collection arbitrations now encompasses more than company-initiated arbitrations.¹⁵⁵ In 2009, prior to the period for which we have studied AAA case records, the AAA adopted a moratorium on the filing of debt collection actions. The moratorium continued throughout the study period, and continues to this day.¹⁵⁶ It generally bars consumer financial companies from filing arbitrations with the AAA to collect debt from

demands filed against CSOs were included in the study when consumers alleged that the CSO originated any loan except for an auto-title loan.

¹⁵⁴ NAF reported that in 2006 alone it administered 214,000 debt collection cases. *See* Drahozal & Zyontz, *Creditor Claims*, *supra* note 140, at 77 (noting that it used to be generally accepted that “the vast majority of disputes between businesses and consumers, *both in arbitration and in litigation*, involve claims by creditors seeking to recover amounts allegedly owed by the consumers” (emphasis added)). In July 2009, however, as a result of its settlement with the Minnesota Attorney General, NAF agreed permanently to cease administering most consumer arbitrations, including debt collection arbitrations. The Attorney General based the suit, in part, on allegations that NAF shared common ownership with a number of firms that filed debt collection claims before NAF. The demise of NAF has been extensively covered. *See, e.g.*, Nancy A. Welsh, *What is “(Im)partial Enough” in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 391, 427-31 (2010).

¹⁵⁵ Our review procedures for AAA case records are discussed in detail in Appendix B.

¹⁵⁶ The AAA announced its moratorium on debt collection arbitration on July 23, 2009. *See* AAA Press Release, www.adr.org. Its terms are also stated by the AAA in a Notice on Consumer Debt Collection Arbitrations (Oct. 19, 2010), available on the same website. The AAA put the moratorium in place after it identified, by its own account, a number of potential due process and fairness concerns with debt collection arbitration. *See Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts*: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight, 111th Cong. (July 22, 2009) (testimony of Richard W. Naimark on behalf of the American Arbitration Association).

consumers, but it allows for two exceptions to this general rule. First, such companies may file such debt collections if a court orders the case to arbitration. Second, companies can file debt collection arbitrations if the consumer affirmatively consents in writing to the arbitration after the dispute arises, in which case the arbitration is a “mutual submission.” Furthermore, the moratorium does not apply at all to arbitrations filed by the consumer alone.¹⁵⁷

Following the moratorium, there are still company-filed AAA arbitrations that seek to collect debt. As noted, these must now follow a court proceeding sufficient to generate a court order in favor of arbitration. We included these cases in our debt collection arbitration category. But in addition to company-filed debt collection cases there also can be mutual submissions or consumer filings.¹⁵⁸ To capture all of these categories, we defined “debt collection arbitrations” to mean not only collection actions filed by the company, but also those arbitrations filed mutually or by the consumer in which the parties are contesting an alleged debt claimed by the company in a preceding action in court.

More specifically, we counted mutual submissions and consumer-filed disputes as debt collection arbitrations when the case included a substantive debt dispute and the arbitration record shows that there was a prior court proceeding as to which the consumer invoked arbitration.¹⁵⁹ We recognize that an invocation of arbitration can take several forms. In some cases, the record may show that the consumer moved to compel arbitration in a prior court collection action. In others, the invocation may consist of filing a demand for arbitration in lieu of filing an answer in court to the company’s collection litigation in court. In others, the consumer may simply inform the company that he or she is invoking the arbitration clause in order to end the collection action in court. Although in some of these cases the consumer may also raise non-debt, affirmative claims, we think it is appropriate to describe such disputes as

¹⁵⁷ We have not reviewed the AAA filings for compliance with the AAA moratorium. Based on our review to date, however, we have no reason to believe the AAA is not following its stated terms.

¹⁵⁸ For purposes of this presentation, we categorize a claim as consumer-filed, company-filed, or mutually submitted based on what the AAA claim form records. Further details are in Appendix B.

¹⁵⁹ We do not count a procedural challenge to debt collection, without more, as a substantive debt dispute. So a claim under the Fair Debt Collection Practices Act that covers only the *manner* in which debt is being collected would not be considered a substantive debt dispute. We use that term for disputes that cover claims about what amount of money is owed (or not owed) to the company by the consumer.

debt collection arbitrations.¹⁶⁰ Collection claims were previously at issue in court, and the amount of debt subject to collection is at issue in the arbitration.

We recognize that this approach works an expansion of the traditional understanding of debt collections as company-filed disputes.¹⁶¹ There were a number of pleading formats in consumer-filed and mutually submitted AAA arbitrations, however, that persuaded us that the debt collection category needs to be broadened in this way. In some cases, for example, the consumer may affirmatively state that he or she has no claims but wants the arbitrator to resolve the merits of the company's underlying debt collection claim. In others, the consumer states that he or she is filing the arbitration demand instead of filing an answer to a collection claim in court, or the consumer may file an arbitration for a declaratory judgment that he or she does not owe the amount claimed by the company. At least where there is evidence of prior proceedings in court, we think it is appropriate to recognize these as debt collection arbitrations, even though in some cases they may contain other consumer claims as well.¹⁶²

In some respects, however, we may have undercounted debt collection arbitrations in our total pool of cases. Our definition relies on an indication in the arbitration record of prior court proceedings. The arbitration record may not contain that indication, even when there was, in fact, a prior collection action in court. In addition, even when a company has not yet sued in court to collect debt, it is possible that some consumers are preemptively filing arbitrations to

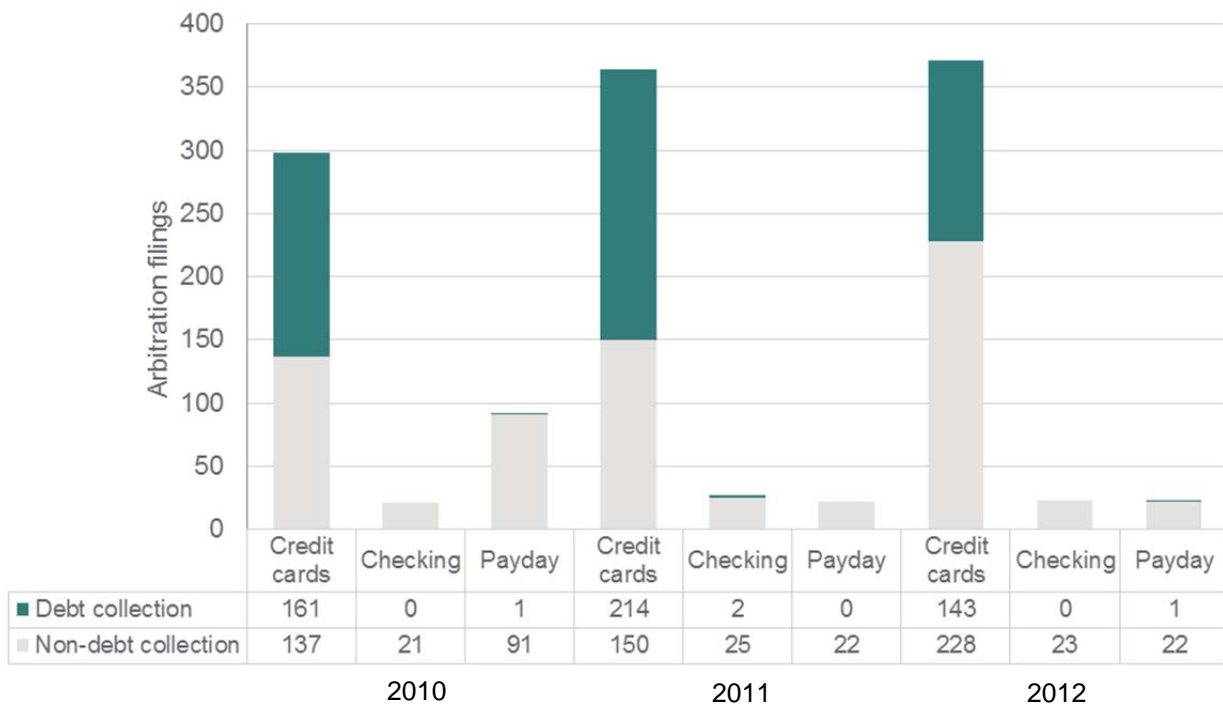
¹⁶⁰ We provide information about the affirmative claims made by consumers in debt collection arbitrations in section 4.6.2 below.

¹⁶¹ There may be a precedent in some of the NAF data. In 2007, Public Citizen published results from its review of the nearly 34,000 consumer arbitrations that NAF disclosed as occurring in California between the beginning of 2003 and March 2007. Consumers filed 118 of these arbitrations. All but 15 of the 118 consumer-filed cases, however, were described by NAF as "collection" cases. *See* Public Citizen, *supra* note 143, at 1-2. Drahozal & Zyontz did not identify any consumer-filed cases as debt collection arbitrations in their review of 2007 AAA consumer case records. It is possible, however, that their study would not have identified such cases because their sample of case records was limited to *awarded* cases. To the extent that consumer-filed debt collection cases tend to settle out or are withdrawn or otherwise closed pre-award, they will not show up in awarded cases. Alternatively, these cases may have become more common since 2007.

¹⁶² Overall, most of the consumer- and mutually-filed debt collection submissions encompass only a substantive dispute about the amount of debt owed. Fewer than half include non-debt claims as well. *See* section 4.6.1.

challenge the company’s pre-judicial assertion of a debt.¹⁶³ In fact, a substantial number of the “non-debt collection” credit card arbitrations in our review appeared to involve only a substantive debt dispute and no non-debt claims at all, even though the arbitration may be filed by a consumer. Ultimately, though, we opted to use objective rules to define debt collection arbitrations, rather than trying to assess whether the weight of the arbitration record indicated that collection activity was already underway before a substantive debt dispute reached arbitration. But it is important to bear in mind that our “non-debt collection category” included a large number of cases in which debt was at issue.¹⁶⁴

FIGURE 5: ARBITRATION FILINGS BY TYPE AND PRODUCT



¹⁶³ Cf. Sternlight, *Mandatory Binding Arbitration Clauses*, *supra* note 136, at 99 & n.69 (noting statement by JAMS General Counsel that most consumer arbitrations filed before JAMS “are from claims alleging that certain credit card companies violated federal collection statutes, asserted to fend off potential collections actions by those companies.”).

¹⁶⁴ We considered relying only on the subject matter of the claims at issue in arbitration to differentiate “debt arbitrations” from “non-debt arbitrations.” Our subject-matter typology for disputes, which we discuss in sections 4.5.2 and 4.6.2, identifies when arbitrations include substantive claims about the amount of debt owed. We determined, however, not to rely on that debt dispute tag alone.

Figure 5 shows the breakdown between debt collection arbitrations and non-debt collection arbitrations by product market for the three years covered by the AAA Case Data. Overall, there were 522 debt collection arbitrations and 719 non-debt collection arbitrations for all three years combined for our product markets. For checking account and payday loan arbitrations, the norm was non-collection. For credit card, by contrast, debt collection arbitrations were a slight majority of the disputes. All but four debt collection arbitrations were credit card disputes.

At least in the period of our review, parties initiated AAA consumer arbitrations by filing a standard one-page “claim form.” The claim form asks whether the arbitration is submitted at the request of the consumer, at the request of the company, or by “mutual agreement,” meaning that the arbitration is submitted by both parties.¹⁶⁵ We recorded the identity of the filing party based on the indicated response to this question.¹⁶⁶ Claim forms recorded 146 (or 28%) of the debt collection arbitrations in the AAA Case Data as company-filed. Another 47 (or 9%) of debt collection arbitrations were mutual submissions. Finally, 329 (or 63%) were consumer submissions. On the non-collection side, 569 (or 79%) of the filings were by consumers. There were smaller shares of mutual submissions (132 filings or 18%) and company-filed (18 filings or 3%) non-collection claims.

We discuss debt collection arbitrations and non-collection arbitrations in more detail in sections 4.5 and 4.6.

4.2.3 Credit card federal court filings

Although we have not completed our litigation review of court filings raising disputes about these same three products, we have obtained some results. For comparative purposes, we provide those results here. Our methodology to identify these cases is provided in Appendix C.

For the 2010 through 2012 period, we have preliminarily identified 3,054 credit card cases filed in federal court. This breaks down into 1,033 cases in 2010, 883 cases in 2011; and 1,138 cases in

¹⁶⁵ The claim form first asks: “How is this claim being filed?” Parties are instructed to check only one option. In addition to “By request of the consumer,” and “By request of the company,” the form offers “By mutual agreement (“submission”).”

¹⁶⁶ We have not attempted to verify whether that recording was accurate. At least in some cases, we have noted that there is no apparent signature from the identified claimant in the record we have reviewed.

2012. All but four cases were filed by consumers, which means that consumers filed more than four times as many federal court credit card disputes as AAA credit card arbitrations over this time period.¹⁶⁷ There were jury demands in 2,739 of these federal filings. Some 418 of the cases were filed as purported class actions. Of these, 156 were filed in 2010, 121 were filed in 2011, and 141 were filed in 2012.

4.3 Representation

4.3.1 Prior research

Prior research has studied representation rates, and their potential impact, in AAA consumer arbitrations. In their study of 301 AAA consumer arbitrations that resulted in an award in 2007, Drahozal & Zyontz found that consumers proceeded without an attorney in almost half the cases.¹⁶⁸ Consumers were significantly more likely to have counsel when they were the claimant in arbitration (55.4%) than when they were responding to company claims in arbitration (29.5%). Some studies also report high rates of employee representation by counsel in AAA employment arbitration.¹⁶⁹

4.3.2 Data

The following four figures show representation rates in the AAA Case Data, for consumers and companies, for all three product markets, and by debt collection and non-collection arbitrations. These data may understate company representation rates. It was straightforward from the AAA Case Data to identify the presence of outside counsel acting for the consumer or the company. It

¹⁶⁷ Over three years, some 705 of the AAA filings were credit card disputes that the claim form recorded as being filed by consumers. None of the class arbitration filings were credit card disputes.

¹⁶⁸ Drahozal & Zyontz, *Empirical Study*, *supra* note 140, at 903.

¹⁶⁹ See Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8:1 J. EMP. LEG. STUD. 1 (March 2011) at 16-17; see also Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RES. 777, 800 n.93 (2003) (for a sample of awarded AAA employment arbitrations, employees subject to a mandatory arbitration clause proceeded pro se in one-third of the cases).

was hard to tell, however, whether an internal company representative was a lawyer. Except where we could reliably identify outside or in-house counsel, therefore, we assumed that companies were unrepresented.

FIGURE 6: OVERALL REPRESENTATION RATES BY ARBITRATION TYPE 2010-12

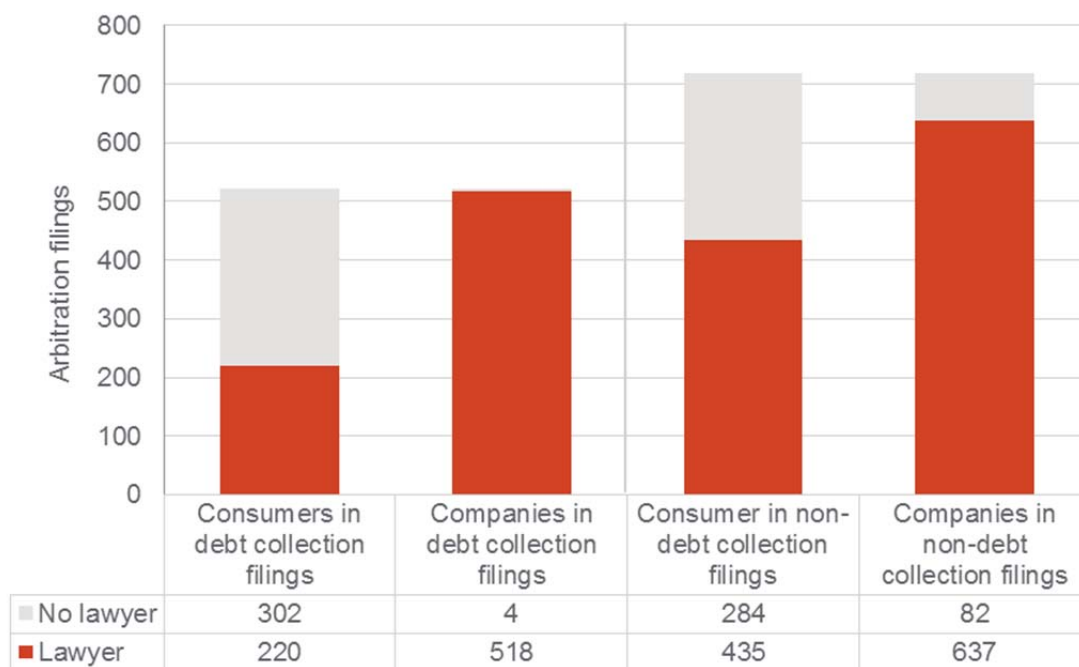


FIGURE 7: CREDIT CARD ARBITRATION REPRESENTATION RATES 2010-12

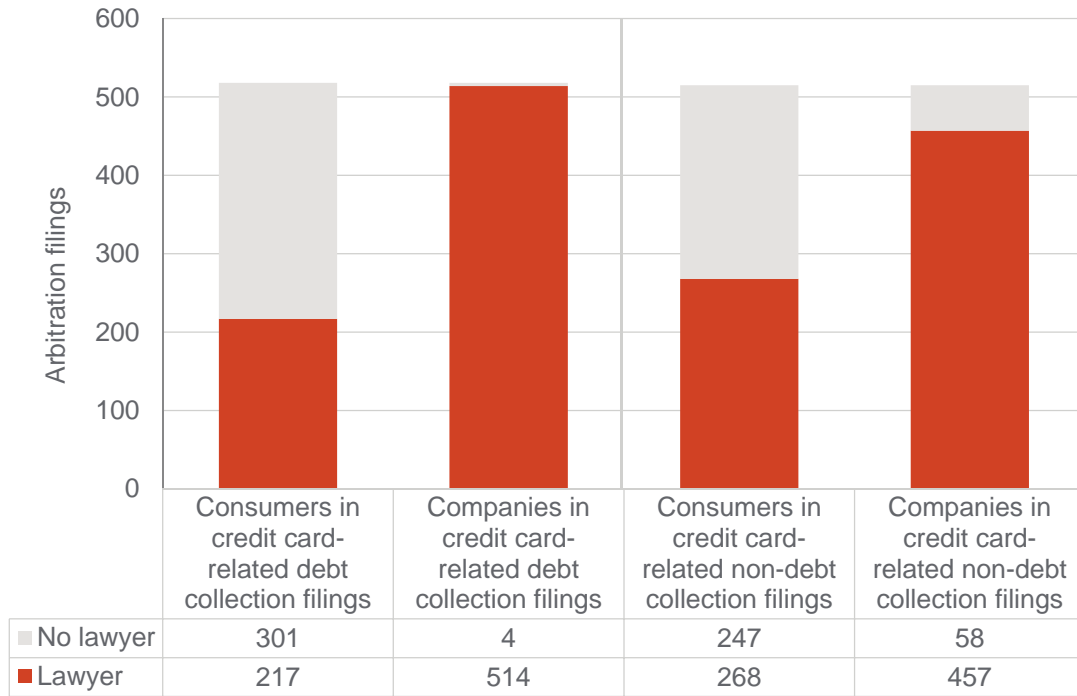


FIGURE 8: CHECKING ACCOUNT ARBITRATION REPRESENTATION RATES 2010-12

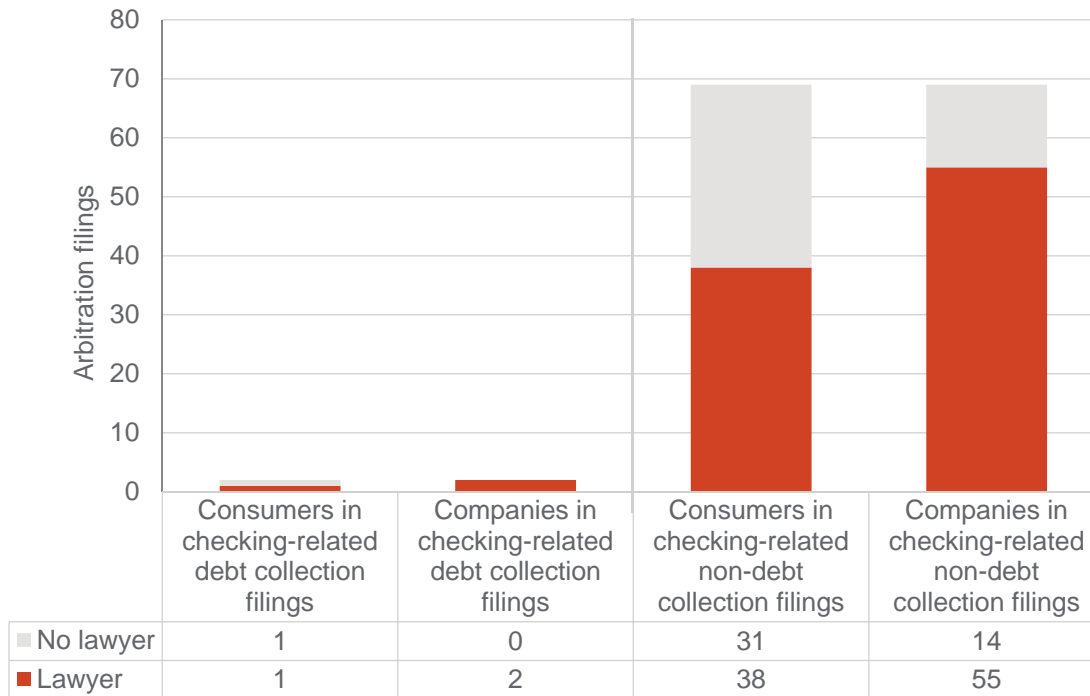
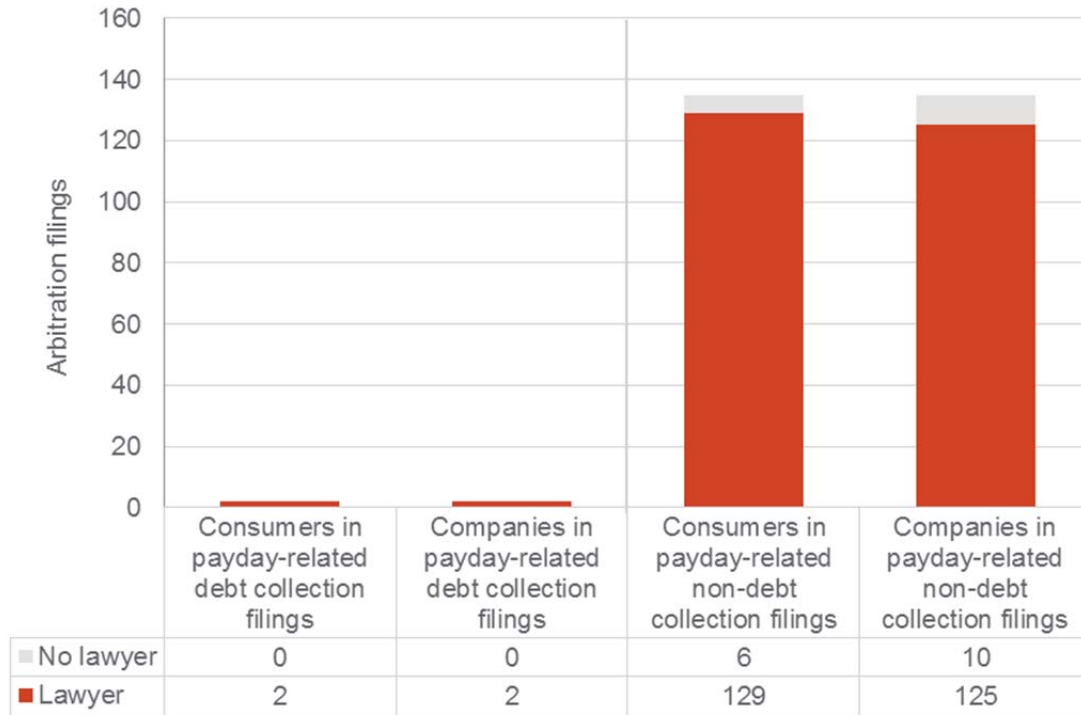


FIGURE 9: PAYDAY ARBITRATION REPRESENTATION RATES 2010-12



The AAA Case Data show that companies rarely participated in consumer arbitration about these three products without counsel. It should be noted, however, that at least some jurisdictions have unauthorized practice rules that may require companies to be represented in arbitration.¹⁷⁰ Whatever the reason, companies were overwhelmingly represented by counsel, both in debt collection and non-debt collection arbitrations, and across all three product markets we examined.

Furthermore, the data are consistent with the notion that a significant share of the consumers who are in arbitration see it as being in their interest to have counsel as well. Overall, nearly 53% of consumers in these arbitrations had counsel. In non-collection cases, consumers were generally more likely (61%) to be represented by counsel than to proceed without counsel

¹⁷⁰ See, e.g., *Nisha, LLC v. TriBuilt Const. Group, LLC*, 388 S.W.3d 444 (Ark. 2012).

(39%).¹⁷¹ (The rate of representation, moreover, did not vary to any extent between non-collection cases that included debt disputes and those that did not.) In debt collection arbitrations, consumer representation was somewhat lower at 42% of the disputes filed.

4.3.3 Repeat counsel

Another feature of representation in these consumer arbitrations was the presence of “repeat counsel,” meaning counsel who appeared in more than one case in our dataset. There were several firms that showed up repeatedly across the cases in which there was representation.

This phenomenon was similar for consumer representation in debt collection and non-collection cases. Of consumers represented in debt collection arbitrations, 71% were represented by repeat counsel, and 59% were represented by one of only five repeat firms.¹⁷² Of consumers represented in non-collection disputes, 77% of represented consumers had a repeat counsel. In this case, however, one firm accounted for 29% of the non-collection cases in which consumers had repeat counsel. Overall representation data, including repeat representation data, are depicted in Figures 10 and 11. (The shares depicted in Figures 10 and 11 are for consumers overall. In contrast, the numbers above use represented consumers as the denominator.)

¹⁷¹ Absent one counsel, who represented consumers in 18 effectively identical payday arbitrations in 2010 alone, this number would fall. These cases were all follow-on filings from a single court case in which the same counsel represented a total of 19 consumers.

¹⁷² Scholars who have attempted to study whether there is a “repeat player” impact on arbitration outcomes debate whether or not to count the first instance of a “play” by a counsel or party that then becomes a repeat player. *See, e.g.*, Colvin, *supra* note 169, at 13. For present purposes, we have counted the first play visible to us in the AAA Case Data.

FIGURE 10: CONSUMER REPRESENTATION IN DEBT COLLECTION ARBITRATIONS 2010-12

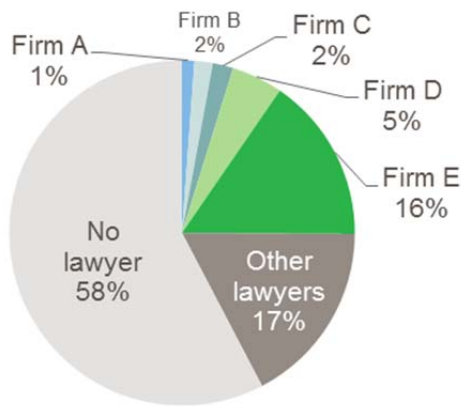
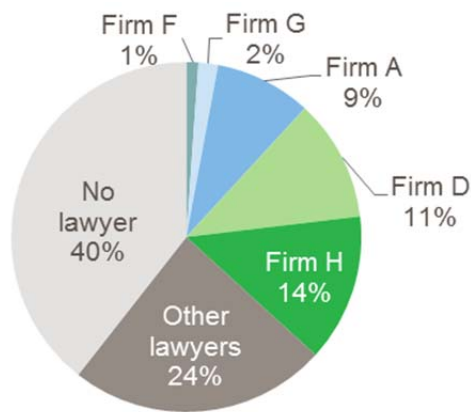


FIGURE 11: CONSUMER REPRESENTATION IN NON-COLLECTION ARBITRATIONS 2010-12



Repeat counsel players also featured on the company side of these disputes, as might be expected given that companies were themselves repeat players. Repeat outside counsel figures in 78% of non-collection cases in which companies were represented. Five repeat players accounted for 22% of the non-collection cases in which companies were represented. Repeat outside counsel were more prevalent in debt collection cases. Some 90% of the debt collection cases in which companies were represented featured repeat counsel. Five repeat outside counsel accounted for 45% of the debt collection cases in which companies were represented.

4.4 Amounts at issue

4.4.1 Prior research

Some earlier empirical work makes claims for the effectiveness of consumer arbitration in handling individual small-dollar disputes. Ernst & Young reported in a 2004 study of consumer arbitration that 73% of the 226 “lending-related” arbitration claims that consumers filed before NAF between January 2000 and January 2004 were for “small claims.” Ernst & Young used this term to describe consumer claims up to \$15,000. The study distinguished “small” claims from “medium” claims—ranging from \$15,000 to \$75,000—and from “large” claims—those above \$75,000.¹⁷³

Other studies have described amounts at issue in consumer arbitration, though without claiming that consumer arbitration is effective at handling small claims.¹⁷⁴ Using case records from a nine-month sample of AAA consumer arbitrations that reached awards in 2007, Drahozal and Zyontz found that 91.5% of consumer claimants brought compensatory claims for \$75,000 or less, and 39.1% of consumer claimants brought claims seeking less than \$10,000.¹⁷⁵ The average consumer claim was for \$46,131, with most consumer claims under \$70,756, although there were a small number of very high consumer claims.¹⁷⁶ They also noted that the proportion of business claims under \$75,000 was higher than the proportion of consumer claims, although the number of consumer claims under \$75,000 was much greater.¹⁷⁷

¹⁷³ Ernst & Young, *supra* note 144, at 8.

¹⁷⁴ See Drahozal & Zyontz, *Empirical Research*, *supra* note 140, at 875.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*; see also *id.* at 876 (graph showing distribution of amounts claimed by consumers and businesses). For arbitrations that closed without reaching an award (for example, because they were settled, withdrawn, or otherwise closed), the study noted that the average consumer claim amounts for those cases increased to \$66,367. See *id.* at 877.

¹⁷⁷ Some 94.5% of company claims were for under that threshold, and company claims averaged \$22,037. See *id.* In a related study, Drahozal and Zyontz also reviewed submitted individual AAA debt collection cases closed between April and December of 2007, and found the average amount sought by creditors was \$20,445. See Drahozal & Zyontz, *Creditor Claims*, *supra* note 140, at 84. The sample for this later study consisted of 61 awarded cases and 406 non-awarded cases. The later study also noted that average claim amounts fell to \$1,172 in cases awarded under an AAA-

4.4.2 Metrics

To identify amounts at issue, we have thus far captured data on amounts at issue at two main points. The standard one-page AAA consumer arbitration “claim form” includes brief instructions to consumer and company claimants about how to submit a dispute using the form.¹⁷⁸ It asks the submitting party to “briefly explain the dispute.” It then asks: “Do you believe there is any money owing to you? If yes, how much?” Our first claim amount data point is the amount stated on the claim form.¹⁷⁹ We refer to this as the “claim form amount.”

Second, if the filing revealed a substantive debt dispute, we separately recorded the disputed debt amount, where that information was available.¹⁸⁰ Some such arbitrations involve not only the disputed debt amount, but other affirmative, non-debt claims. In cases that contain a disputed debt amount and such affirmative consumer claims, the amount at issue is open to some interpretation. The consumer may mean to dispute the debt and seek damages for the full amount of the affirmative claims, but it is also possible that the affirmative claims may not fully represent a separate amount at issue.¹⁸¹ For these cases, at least for the time being, we provide

administered program of debt collection arbitrations filed by a single debt purchaser. The AAA administered this program between September 2007 and June 2009. *See id.* at 85. (To the Bureau’s knowledge, the AAA has not restarted the program.)

¹⁷⁸ The claim form was in consistent use by the AAA for the consumer arbitrations that we studied. In some cases, it represents the full initial statement of the claims at issue. In others, there may be further pleadings attached, such as a demand for arbitration or a copy of an underlying court complaint.

¹⁷⁹ Sometimes claim amounts are expressed as a range (“\$10,000 to \$75,000”) or as a bounded inequality (“up to \$75,000” or “at least 30,000”). There are a number of different ways to treat these. Our approach here is the same method used by Drahozal and Zyontz in their 2010 study. *See Drahozal & Zyontz, Empirical Study, supra* note 140, at 874. We take the mid-point of ranges, and the base amount for any bounded inequality. Thus, a range of “\$10,000 to \$75,000” is treated as a claim for \$42,500.” A claim for “up to \$10,000” or for “at least \$10,000” would be treated the same: as a claim for \$10,000.

¹⁸⁰ We include in the disputed debt amount all components of the alleged debt—principal, fees, and other costs. In some cases, there is a specific indication in the record that the consumer disputes the full amount of the debt. In others, there is no such qualifier or an explicit statement that the full amount of the debt is at issue; in these cases, we record the full amount of the alleged debt as the disputed debt amount. If the consumer only takes issue with a specific portion of the debt, however, we use that stated amount as the debt in issue amount.

¹⁸¹ We recognize that at least in some arbitrations involving disputed debt amounts, the additional consumer claims may primarily reflect the consumer’s effort to defeat the company’s effort to collect an alleged debt, which raises the possibility that at least in some such cases the disputed debt amount alone may most accurately reflect the “true” amount at issue. An alternative view, however, is that even if the debt dispute and the affirmative claims are related, the sum of the disputed debt amount and the affirmative claim amounts reflects the size of the range between the

data only on the debt amount at issue, but acknowledge that this may under-report the full amount at issue for this set of cases.

We have also begun to record the latest statement of the affirmative claim amount that we were able to find prior to claim resolution, but have not completed that review. (Parties may change or clarify a claim amount for a number of reasons. They may develop a different valuation based on evidence. Their awareness of fees may also change claim amounts.¹⁸²) We also attempted to record punitive damage claims, but we found such claims so seldom quantified that we do not think we will be able to offer any assessment of punitive damage claims. (Where punitive damage claims were separately identified, we did not include them in the claim form amounts.)

4.4.3 Data

Figure 12 shows the distribution of discernible disputed debt amounts in debt collection arbitrations in the AAA Case Data. Across 492 disputes, the average was \$15,725, with a median of \$10,266.¹⁸³ Across 141 disputes, company-filed debt collection arbitrations had an average disputed debt amount of \$19,619 with a median of \$11,303.¹⁸⁴ Across 351 disputes, consumer- and mutually-filed debt collection arbitrations had an average disputed debt amount of \$14,161, with a median of \$10,000.¹⁸⁵

outcomes requested by each side. For example, if a consumer sues for \$12,000 and a company counterclaims for \$5,000, the range of possible outcomes is between the consumer losing \$5,000 (and not winning the affirmative claims) and the consumer winning \$12,000 in damages on the affirmative claims (and not losing on the debt claim). The difference between these two outcomes—and therefore the amount in dispute—is \$17,000, which is the sum of the disputed debt and the affirmative claim amounts.

¹⁸² As explained in section 4.9 below, until March of 2013, claim amounts had a direct impact on fee levels for consumers and companies in arbitrations covered by the AAA Supplementary Procedures for Consumer Arbitration. From March 2013, that is no longer the case. *See* section 4.9.

¹⁸³ This excludes 30 debt collection cases in which the disputed debt amount was not apparent from the arbitration record.

¹⁸⁴ This excludes five cases in which the disputed debt amount was not identified.

¹⁸⁵ This excludes 25 cases in which the disputed debt amount was not identified.

FIGURE 12: DEBT AMOUNTS IN DISPUTE IN DEBT COLLECTION ARBITRATIONS 2010-12

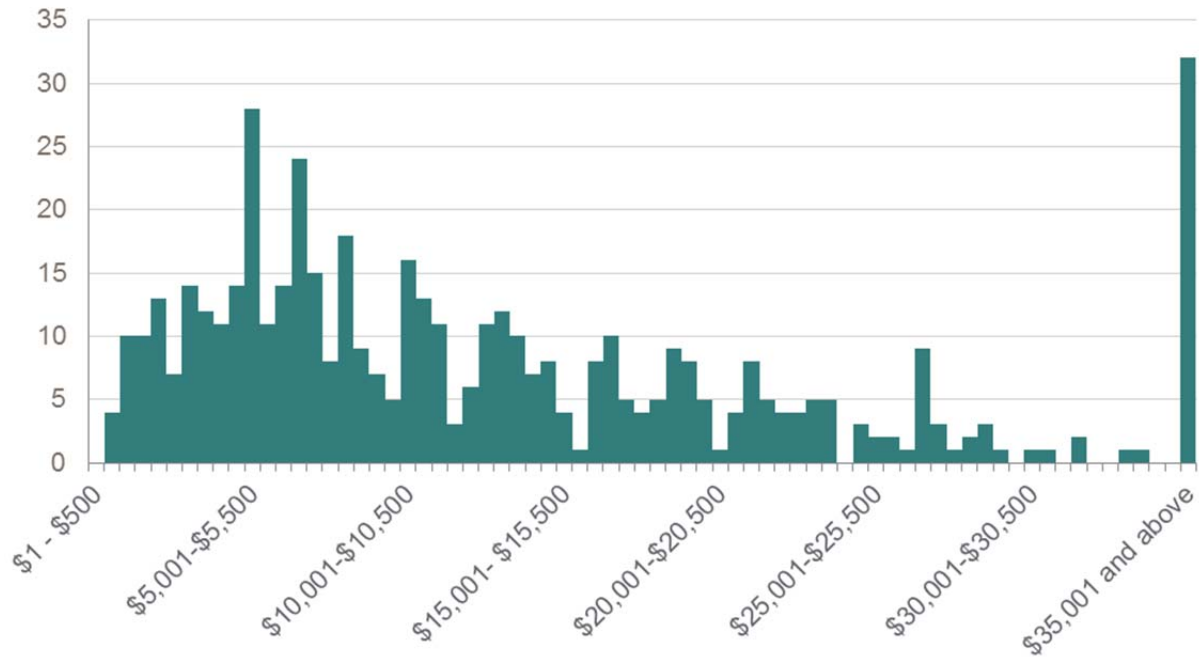
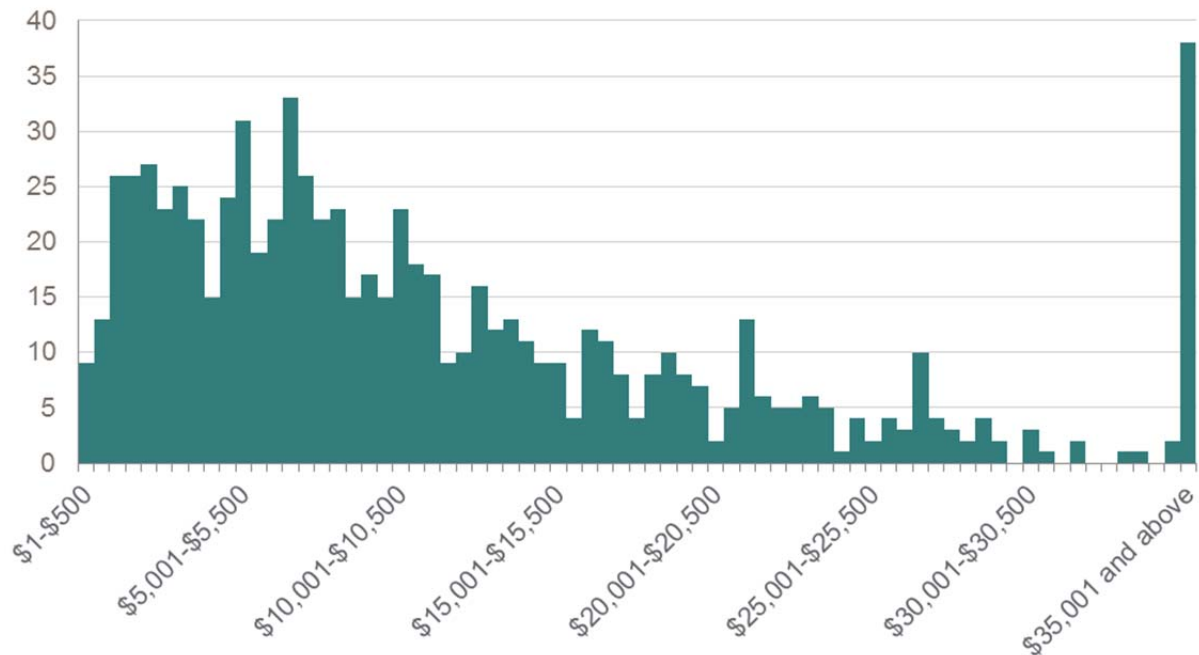


FIGURE 13: DEBT AMOUNTS IN DISPUTE IN ALL ARBITRATIONS 2010-12



As noted, disputed debt amounts were also at issue in non-debt collection arbitrations. These were arbitrations in which there was a substantive debt dispute, but where we lacked one or more of the objective criteria we used to identify debt collection arbitrations. Figure 13, therefore, shows the distribution of discernible disputed debt amounts across debt collection and non-collection cases. For the 787 total disputes in which we could identify a disputed debt amount, the average debt amount was \$13,418 and the median was \$8,641. Over three years, there were 21 cases in which the disputed debt amount was at or below \$1,000, or an average of seven such disputes a year. In total, we saw approximately \$10.6 million in debt amounts disputed in AAA arbitrations for these product markets from 2010 through 2012.

Figure 14 shows the consumer claim form amount in all cases in which we could identify a claim form amount but could not identify a disputed debt amount.¹⁸⁶ Across these 326 cases, the average consumer claim amount was \$38,726, and the median was \$11,805. Overall, we identified just under \$15 million in claim form amounts in these cases for these product markets over this period. The breakdown by product was as follows: 146 credit card cases¹⁸⁷ had an average claim amount of \$26,187 and a median of \$8,945; 61 checking account cases¹⁸⁸ had an average of \$66,577 and a median of \$15,000; and 119 payday loan cases¹⁸⁹ had an average of \$39,834 and a median of \$42,500.

¹⁸⁶ We have excluded one claim for \$100,000,000, both from the figure and from the calculation of the mean and the median. We have included in the calculation of the mean and median two higher claims, for \$500,000 and \$1,314,965, but we have not shown them in the depicted figure. The data showed some clumping of claims at \$10,000, \$42,500 and \$75,000, presumably because consumers may align claim amounts to the thresholds at which filing fees change. *See* section 4.9 for more details on how the fee schedules applicable during the period of our review varied by claim amount. Finally, this calculation excludes cases in which no specific claim amount was identifiable.

¹⁸⁷ This excludes 64 cases for which no specific claim amount was identifiable.

¹⁸⁸ This excludes 4 cases for which no specific claim amount was identifiable.

¹⁸⁹ This excludes 3 cases for which no specific claim amount was identifiable.

FIGURE 14: CLAIM AMOUNTS IN CASES WITHOUT DISPUTED DEBT AMOUNTS 2010-12

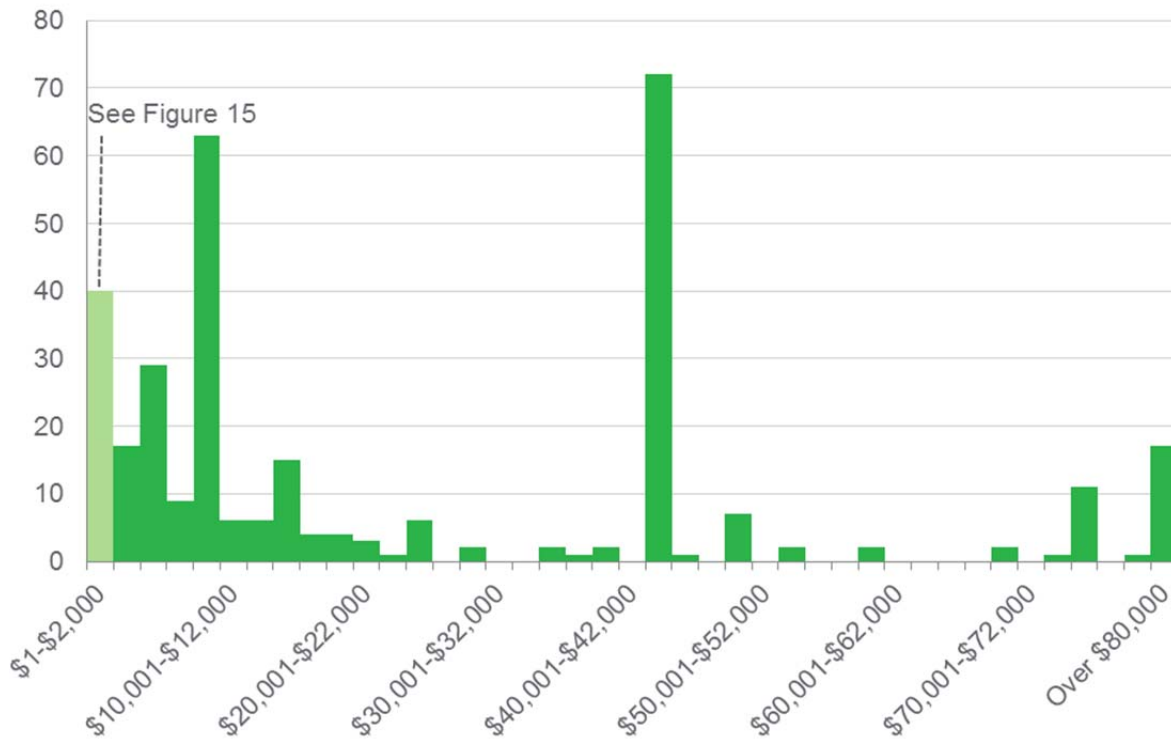
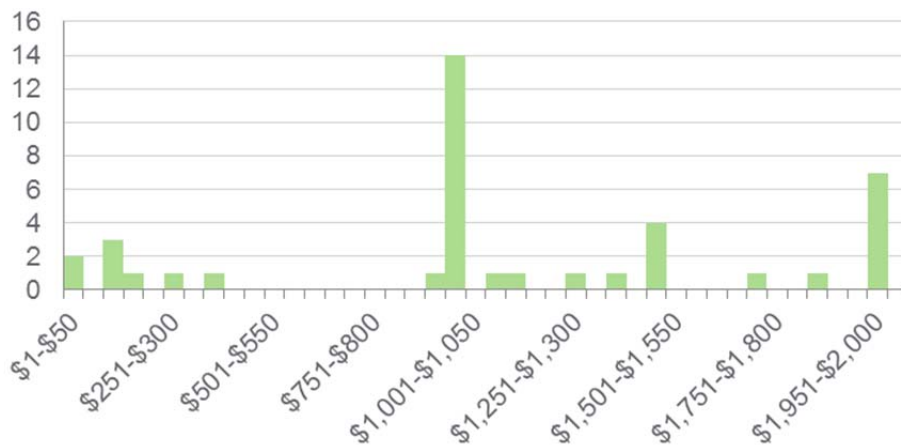


Figure 15 shows a more detailed breakdown for the claims in Figure 14 at the lower end of this range. Over three years, therefore, there were 23 claims seeking damages of \$1,000 or less, for an annual average of just over eight such claims. Of these 23, some 14 were for exactly \$1,000, meaning that there were nine such cases over three years seeking under \$1,000.

FIGURE 15: SMALLER CLAIM AMOUNTS IN CASES WITHOUT DISPUTED DEBT AMOUNTS 2010-12



The Chamber of Commerce, citing Justice Breyer, offers one possible basis for a “small-dollar” threshold: an example of a “small damage claim” would be “the value of only a defective refrigerator or television set.”¹⁹⁰ The average price of a TV set purchased in Q2 2012 was \$1,224.¹⁹¹ Using that number as a threshold for “small-dollar” claims, there were under 19 cases on average each year in which there was a “small dollar” debt dispute. Looking only at cases without disputed debt amounts, but only affirmative claim amounts, there were just over 8 cases each year on average that were “small dollar.”

4.5 Non-collection arbitrations

4.5.1 Incidence by company

The figures below show the total and annual number of non-collection cases for the most frequently named companies in these arbitrations. For each of the three markets, we have included the ten most frequently named companies.¹⁹² In some cases, the same company shows up in more than one figure. These data reflect arbitration filings only; they do not represent resolved arbitrations or arbitration awards. Given the overall count of these disputes relative to the customer populations of the various companies, the differences among the companies in terms of numbers of arbitrations may not be statistically significant. We provide the data in order to show the number of disputes faced by the companies that are most often parties to these disputes.

Figure 16 provides data that covers 469 individual credit card arbitration filings over three years. Company 1 was named in 183 of these; at least one of companies 2 through 10 was named in the remaining 286. The same ten companies were parties in more than 350 federal court

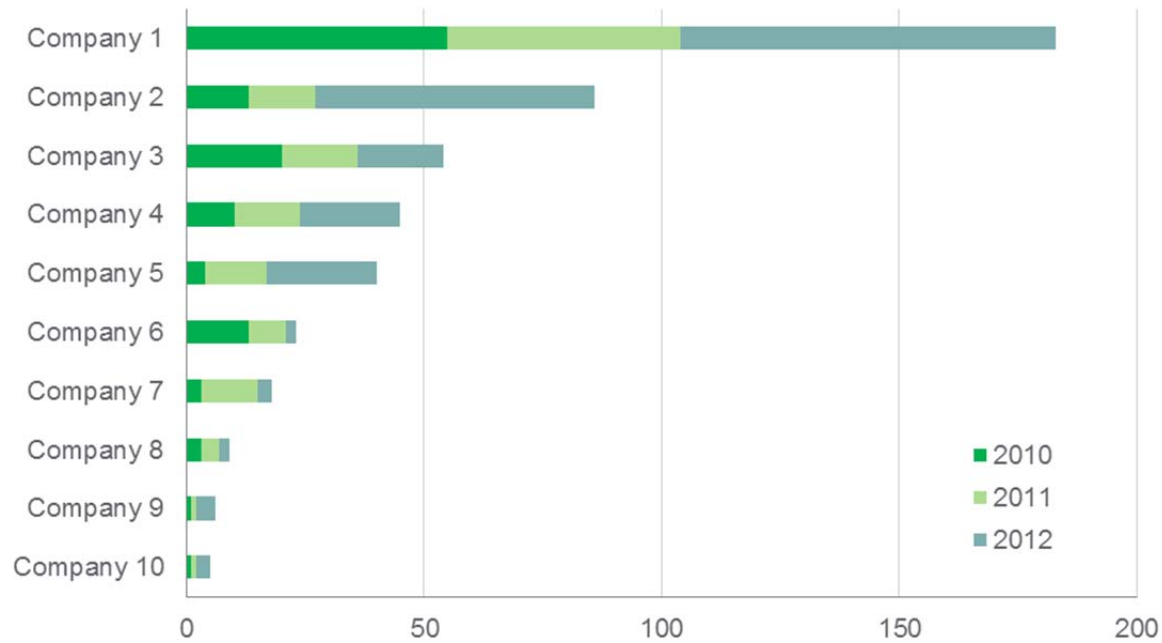
¹⁹⁰ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995), cited in Chamber RFI Comment at 11-12.

¹⁹¹ Time reported that in Q2 2012, the average price paid for a new TV in the US was \$1,224. See <http://business.time.com/2012/08/01/tv-prices-shrink-yet-average-tv-purchase-costs-more>.

¹⁹² We have counted all disputes naming a member of the relevant corporate family.

credit card filings for the same time period, of which more than 50 were class action filings.¹⁹³ Company 1 accounted for less than 15% of the federal court filings, although it faced a number of class filings in court and no class filings in arbitration. The other nine companies, however, were parties in more federal court filings than in AAA non-debt collection arbitration filings for this product market.

FIGURE 16: NON-COLLECTION CREDIT CARD ARBITRATIONS BY COMPANY 2010-12



¹⁹³ See section 4.2.3.

FIGURE 17: NON-COLLECTION CHECKING ACCOUNT ARBITRATIONS BY COMPANY 2010-12

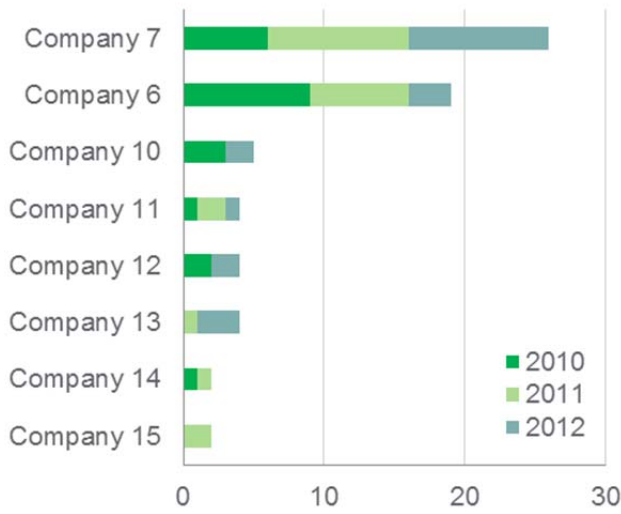
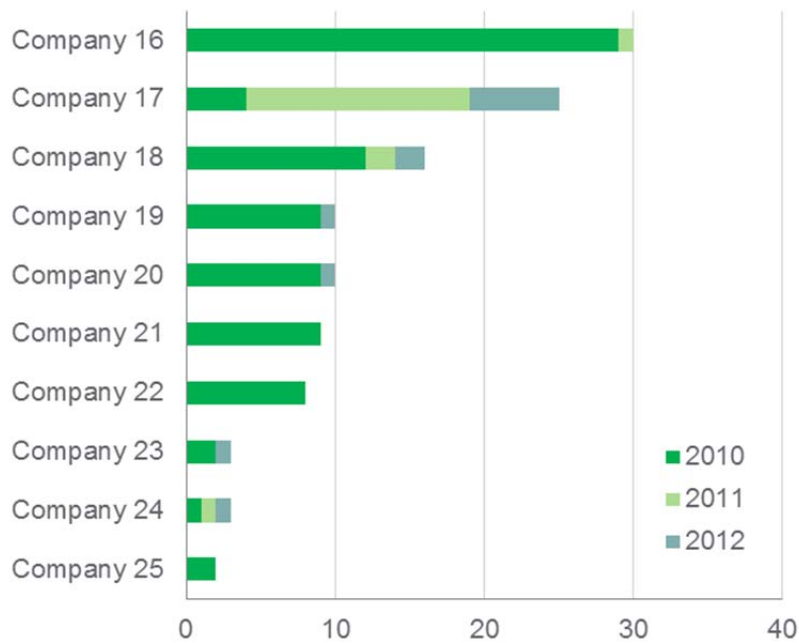


FIGURE 18: NON-COLLECTION PAYDAY ARBITRATIONS BY COMPANY 2010-12



4.5.2 Claim types and claim subject matters

To date, there has been relatively little data available about the kinds of claims that consumers bring in arbitrations. Some public data give some disaggregation by subject matter of consumer arbitrations generally, but there is nothing available that would let a reviewer isolate cases in

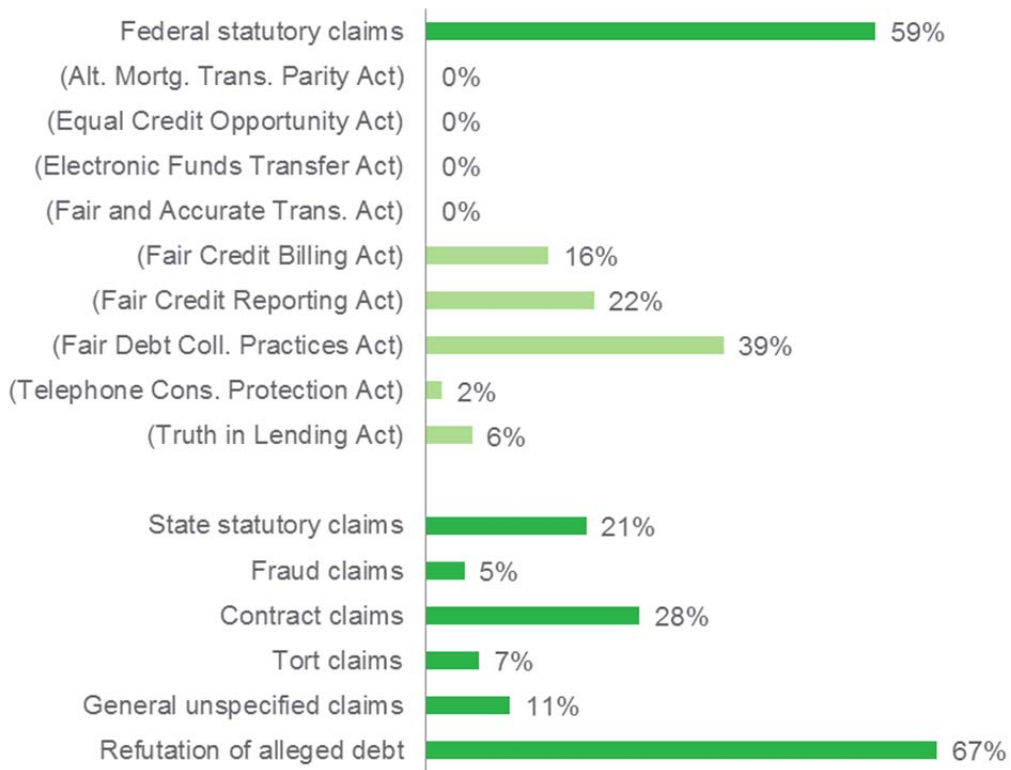
particular consumer financial product markets, let alone disaggregate those cases into different types.

Within each product market, we used a number of different data fields to capture the type of claims involved and their subject matter (or matters). For all arbitrations, we allowed for an identification of the basic claim type(s) involved, such as contract law claims, federal statutory claims, state statutory claims, fraud, and tort.¹⁹⁴ This data is shown in Figures 19 through 21. If a case involved claims under a federal statute, we also recorded the specific statute involved.¹⁹⁵ This data, too, is shown in Figures 19 through 21. Each case may have raised more than one type of claim, but no single case was counted twice in any specific claim category. (Thus, a case that raised two FDCPA claims and one FCRA claim would show up once in the federal statutory count, once in the FDCPA count, and once in the FCRA count.) Thus, the percentages shown for the different claim types do not sum to 100% for any given product.

¹⁹⁴ We do not double-count common law fraud under tort as well. “Tort” as used here excludes fraud claims.

¹⁹⁵ The federal statutes listed in the credit card cases are the Fair Debt Collection Practices Act (“FDCPA”), the Fair Credit Reporting Act (“FCRA”), the Fair Credit Billing Act (“FCBA”), the Fair and Accurate Transactions Act (“FACTA”), the Equal Credit Opportunity Act (“ECOA”), the Communications Act, the Alternative Mortgage Transactions Parity Act (“AMTPA”), the Telephone Communications Privacy Act (“TCPA”), the Truth in Lending Act (“TILA”) and the Electronic Financial Transactions Act (“EFTA”). The FCBA is actually codified as part of TILA, but for clarity we listed FCBA claims separately from other TILA claims. The checking account cases do not add any new statutes. The payday cases add the Credit Repair Organizations Act (“CROA”).

FIGURE 19: CONSUMER CLAIM TYPES IN NON-COLLECTION CREDIT CARD ARBITRATIONS 2010-12



Note: 0% entries in Figure 19 reflect a single instance of the claim.

FIGURE 20: CONSUMER CLAIM TYPES IN NON-COLLECTION CHECKING ACCOUNT ARBITRATIONS 2010-12

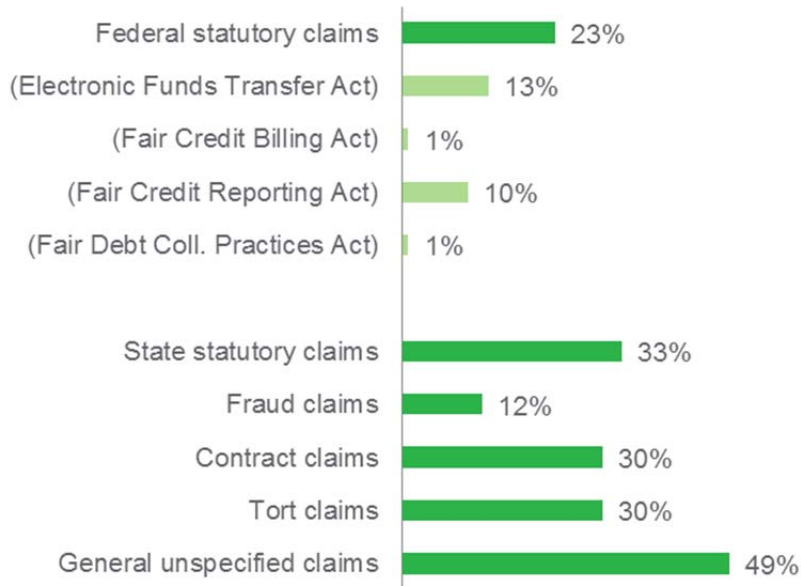
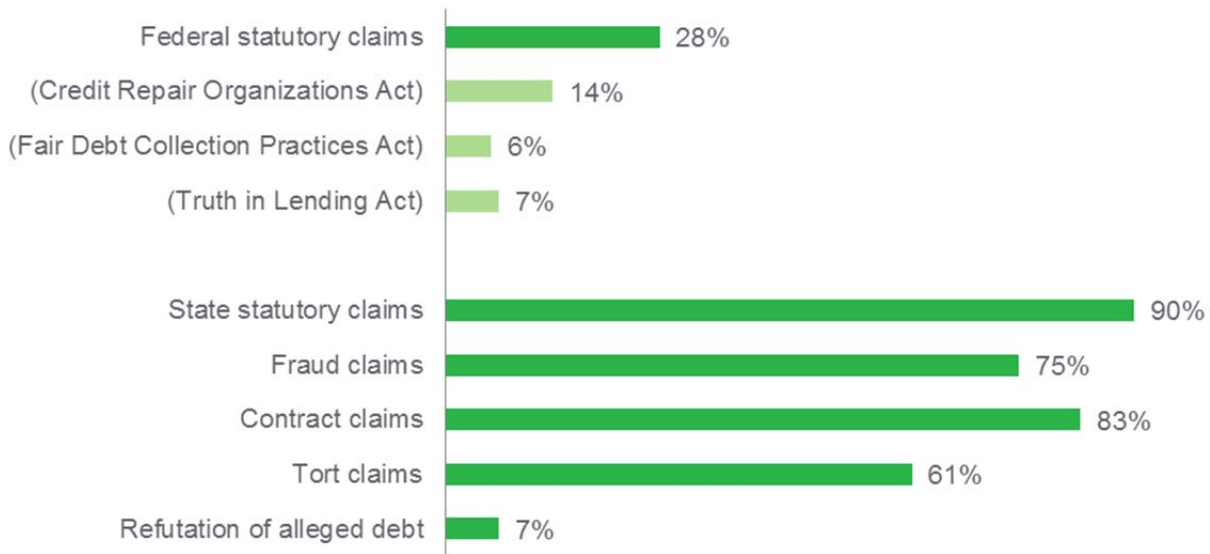


FIGURE 21: CONSUMER CLAIM TYPES IN NON-COLLECTION PAYDAY ARBITRATIONS 2010-12

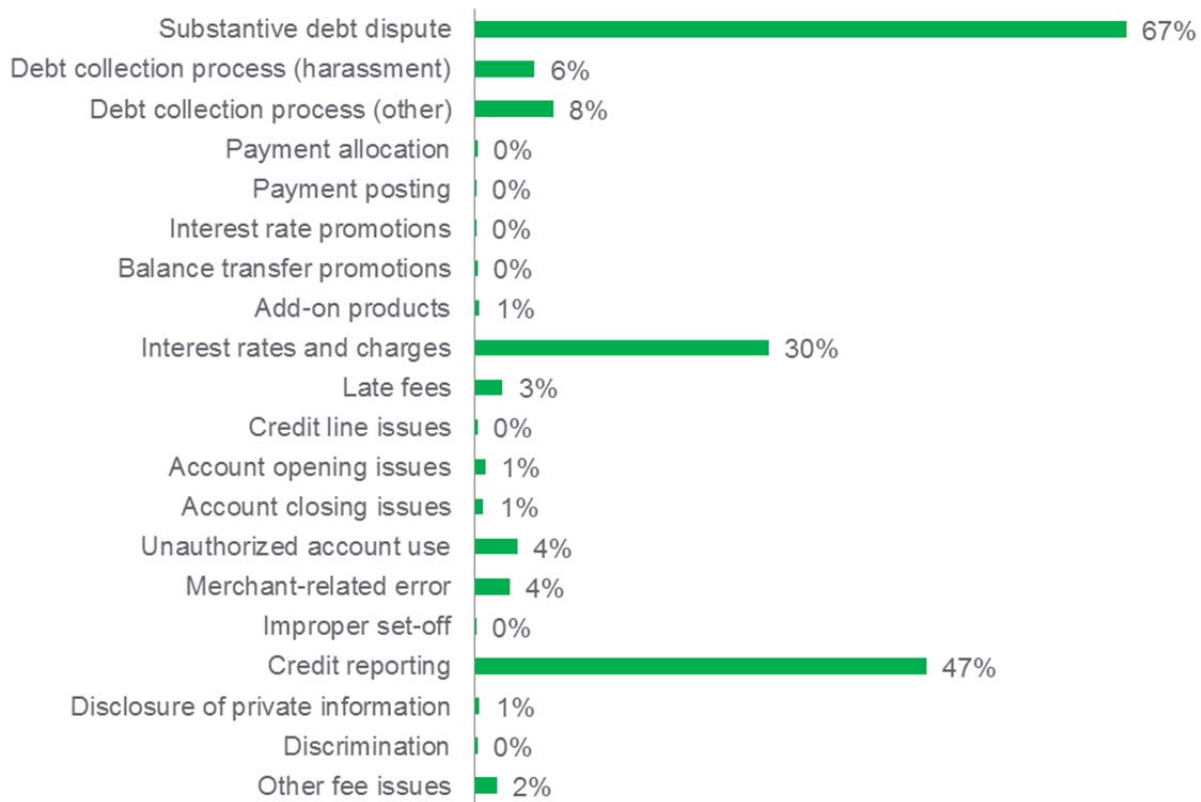


Finally, we also attempted to characterize each dispute by the core subject matter of its claims. We used a maximum of three such subject matter fields for each dispute. Our intention was to capture the essence of the dispute, within an objectively applied dispute typology.¹⁹⁶ The typologies were not identical for each product market. This data is shown in Figures 22 through 24. (In addition to the subject matter fields we defined, we also used two residual categories for each product market: “other” and “not enough information.”)

For credit card disputes, the listed subject matters in Figure 22 are: substantive debt dispute; debt collection process (harassment); debt collection process (other); payment allocation; payment posting; interest rate promotions; balance transfer promotions; add-on products; interest rates/charges; late fees; account opening issues; account closing issues; credit line issues; unauthorized account use; merchant-related error; credit reporting; disclosure of private information; discrimination; improper set off; and other fee issues. As discussed in Appendix B, our subject matter typology for credit card cases is broader than this, but these were the core subject areas within that typology that were raised by these cases. It is notable that while these cases did not meet our formal ‘debt collection’ definition, the clear majority (346 out of 515, or 67%) still included substantive disputes over the amount of debt owing. In fact, although almost all non-collection credit card disputes were filed by consumers or as mutual submissions, a substantial share (131 out of 515, or more than 25%) of these disputes raised *only* substantive debt issues—and no non-debt claims at all. (As noted above, therefore, our formal definition of debt collection arbitrations may have resulted in our undercounting the true number of such arbitrations.)

¹⁹⁶ Our subject matter categories are to some extent subjective. Clearly, it is possible to devise other typologies that are more or less disaggregated. We derived ours from a review of complaints filed on electronic litigation databases and by consultation with Bureau experts in specific fields. Our methodology is explained in greater detail in Appendix B.

FIGURE 22: CREDIT CARD NON-COLLECTION ARBITRATION SUBJECT MATTERS 2010-12



Notes on Figure 22:

1. Entries showing 0% reflect either one or two cases.
2. In 17 of the 32 “Debt collection process (harassment)” disputes, the consumer also brought claims refuting the amount of debt claimed, but that information is not reflected in the substantive debt dispute entry. Similarly, in 37 of 42 “Debt collection process (other)” disputes, the consumer also brought claims refuting the amount of debt claimed, and that information is not reflected in the substantive debt dispute entry. These records were not characterized as substantive debt disputes due to process limitations.

For checking account disputes, the listed subject matters in Figure 23 are: debt collection process (harassment); overdraft ordering/timing; other overdraft issues; account closing issues; account opening/reopening issues; deposits—process issues; deposits—other errors; authorized payments—process issues; authorized payments—other errors; improper set-off; unauthorized recurring payments; disclosure of private information; other unauthorized use; credit reporting; and discrimination. As with credit card, our typology was broader than this, but these were the core subject areas raised by these cases.

FIGURE 23: CHECKING ACCOUNT NON-COLLECTION ARBITRATION SUBJECT MATTERS 2010-12

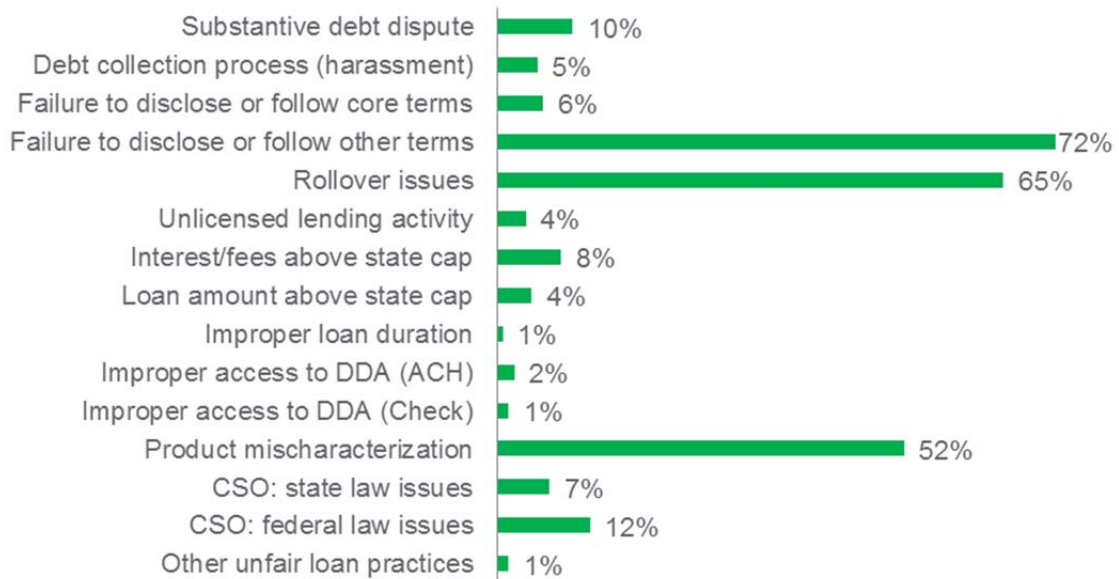


For payday loan disputes, the listed subjects in Figure 24 are: substantive debt dispute; debt collection process (harassment); rollover issues; improper loan duration; failure to disclose/follow core terms;¹⁹⁷ failure to disclose/follow other terms; unlicensed lending activity; interest/fees above state cap; loan amount above state cap; improper access to DDA (ACH); improper access to DDA (check); product mischaracterization; other unfair loan practices; Credit Service Organizations (CSO)—state law issues; and CSO—federal law issues. Once again, our typology was broader than this, but these were the core subject areas raised by these cases.

For non-collection arbitrations that did not raise substantive debt disputes, we have not generally identified recurring pleading forms across cases. We have identified 18 payday disputes that were essentially the same, each involving the same consumer counsel in 2010. These cases were previously all joined in a single court action that was dismissed in favor of arbitration upon the defendant’s motion. They were then refiled in arbitration.

¹⁹⁷ We defined core terms to be finance charge and loan duration.

FIGURE 24: PAYDAY LOAN NON-COLLECTION ARBITRATION SUBJECT MATTERS 2010-12



Note: In six of the seven “debt collection process (harassment)” disputes, the consumer also brought claims refuting the amount of debt claimed, but that information is not reflected in the substantive debt dispute entry because of limitations in our coding hierarchy.

For non-collection arbitrations that included substantive debt disputes (a category overwhelmingly made up of credit card cases¹⁹⁸), we have not yet identified recurring patterns in the cases that raise only debt issues. In the cases that raised debt disputes and non-debt affirmative claims, however, we did see some recurring pleading forms used by consumer counsel across some of those cases.

¹⁹⁸ There are 359 non-collection arbitrations that include substantive debt disputes. Thirteen of these are payday cases. The remaining 346 are credit card cases.

4.6 Debt collection arbitrations

4.6.1 Incidence

In light of NAF’s demise and the AAA’s continuing moratorium on company-filed debt collection arbitrations, the Bureau noted in its 2012 RFI that we were unaware of recent practice by covered persons to bring claims—and in particular debt collection claims—against consumers in arbitration. No RFI commenter specifically disputed this observation.¹⁹⁹ The number of company-filed debt collection claims—an annual average of 49—in the AAA Case Data was consistent with the Bureau’s view.²⁰⁰ Adding consumer-filed and mutually-submitted debt collection arbitrations to the total count, we identified 522 debt collection arbitrations across three years, or an annual average of 174 such filings. Across three years, all but four of these were credit card disputes, meaning that there were an annual average of 173 credit card debt collection disputes.

Although the 518 credit card debt collection disputes were the biggest single category in the AAA Case Data, they represented a negligible share of credit card debt collection activity overall. Although comprehensive national data on credit card collection litigation is not generally available, our review of small claims court cases offers some indication of how rare debt collection arbitration is at this point. In Philadelphia County, in 2012, in small claims court, and focusing only on a group of 10 issuers (rather than all issuers and debt buyers of credit card debt), we identified more than 2,200 collection cases, more than four times as many credit card debt collection disputes as there were in AAA debt arbitration for the entire country over three

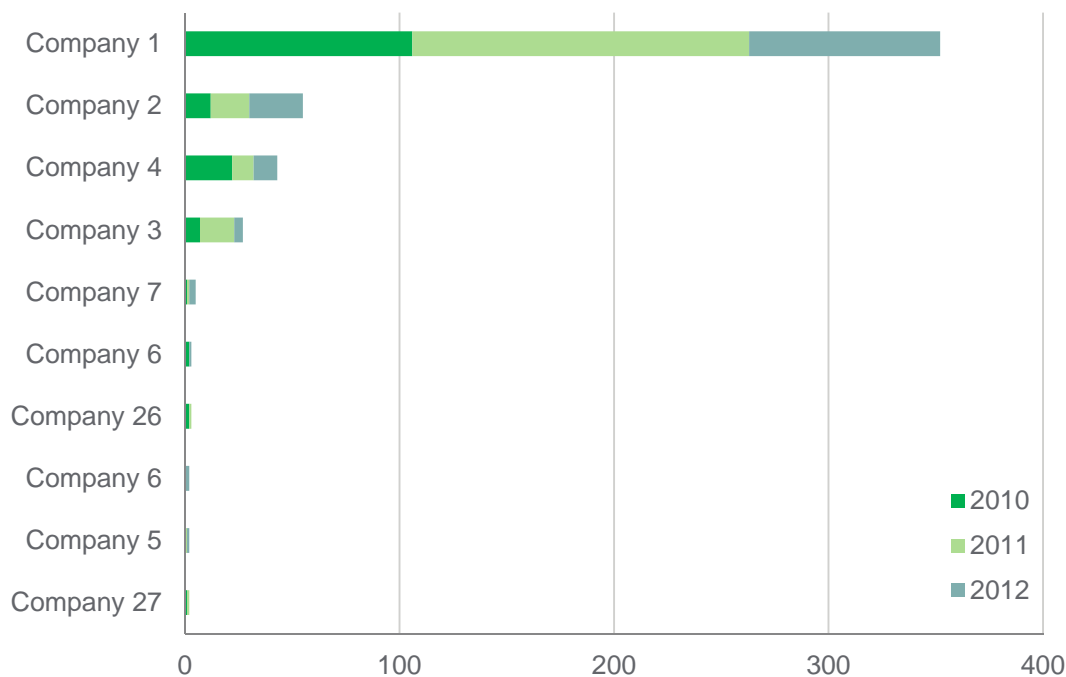
¹⁹⁹ The American Bar Association, the Consumer Bankers’ Association, and the Financial Services Roundtable confirmed that “since July 2009 arbitration has not been used on a large scale for consumer debt collections initiated by companies.” ABA/CBA/FSR RFI Comment at 7, 16.

²⁰⁰ Almost all company-filed claims were debt collection arbitrations. For credit card disputes, 145 out of 153 company-filed cases were debt collection arbitrations. This was consistent with prior research concluding that company claims in arbitration seek payment for goods delivered or services rendered and for “usually very little else.” Drahozal & Zyontz, *Empirical Study*, *supra* note 140, at 872; *see also* Drahozal & Zyontz, *Creditor Claims*, *supra* note 140, at 84 (noting that of the 61 company-filed consumer arbitrations to reach an award in their sample, only 3 were likely not classifiable as debt collection cases).

years.²⁰¹ Despite the relative rarity of debt collection arbitration, however, a slight majority of the credit card disputes in the AAA Case Data were debt collection arbitrations.

Figure 25 shows the number of credit card debt collection arbitrations, broken out by the ten companies that recur most frequently in the AAA debt cases that we reviewed.²⁰² As with the company data on non-collection arbitration filings, the variation here may not have been significant in light of the size of the overall product markets. One company, however, accounted for more than two and a half times the arbitration proceedings of the other nine companies, averaging 118 debt collection arbitrations per year. The drop-off to the remaining companies was precipitous: the fifth company on the list averaged only two debt collection arbitrations per year, and every company after that averaged only one.

FIGURE 25: CREDIT CARD DEBT COLLECTION ARBITRATIONS BY COMPANY 2010-12



²⁰¹ See section 5.3 for detailed data on Philadelphia County small claims court cases.

²⁰² We have not included checking account or payday debt collection cases because there are only four across the three years.

We also note that a relatively high share of the debt collection cases were recorded on claim forms as being filed by consumers or mutually submitted. Of the 518 credit card debt collection arbitrations, more than 72% showed as mutually submitted or consumer-filed. (Most of these were consumer-filings, but nearly 9% were recorded as mutual submissions.²⁰³) In addition, more than 64% of the credit card debt collection cases recorded as filed by consumers or mutually submitted (237 out of 373) raised *only* substantive debt collection issues, and no non-debt claims at all.

To our knowledge, prior studies covering consumer-filed AAA arbitrations have not previously noted consumers bringing debt collection disputes to arbitration. We may look further into possible explanations for this apparent phenomenon. How and when such cases are resolved may provide us with additional information. We may also confer with some of the counsel involved. As we note below, some firms that represent consumers in these cases show a pattern of using common pleading forms across cases.

4.6.2 Subject matter and claims

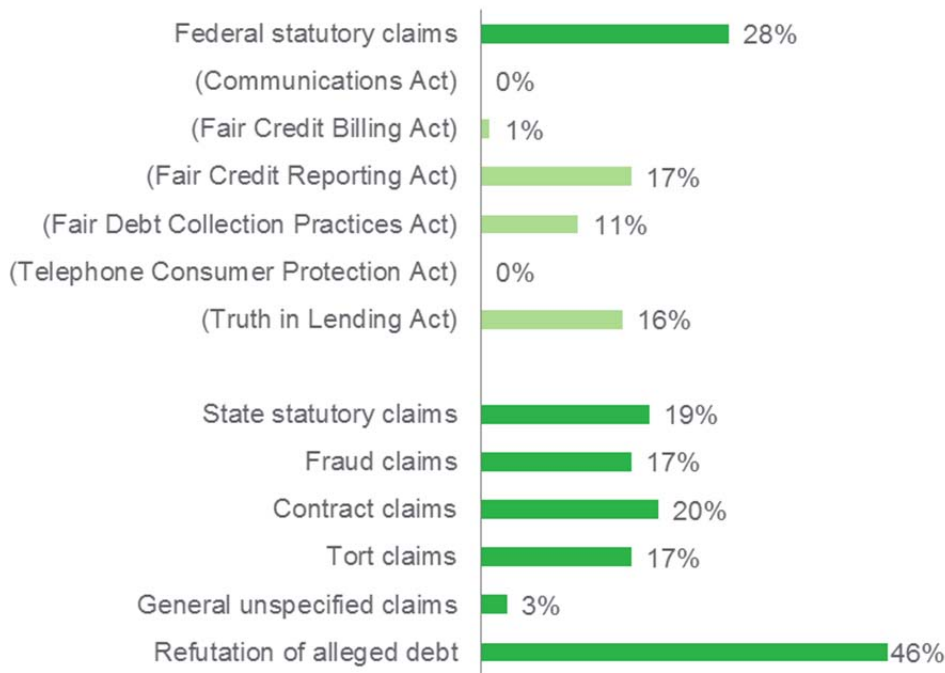
Figure 26 shows the distribution of claim types made by consumers in the debt-collection cases. It follows the same format as Figures 19 through 21. Any one case may have given rise to more than one claim, but no case recorded the same type of claim twice. We limited this to credit card cases only because there were so few debt collection cases for the other two products.

As noted above, some debt collection arbitrations contained consumer claims or counterclaims that went beyond disputing the substance of the alleged debt. Over a quarter of the credit card debt collection arbitrations included non-debt affirmative consumer claims. Almost all of these non-debt claims were made in debt collection disputes filed by consumers or that were mutual submissions.²⁰⁴

²⁰³ Consumers were recorded as filing 67% of the credit card non-collection cases that include substantive debt disputes. The remaining 33% of this same category were recorded as mutual submissions.

²⁰⁴ Consumers made non-debt counterclaims in only around 3% of company-filed debt collection arbitrations. By contrast, they made non-debt claims in 36% of the consumer-filed debt collection arbitrations and in 42% of mutually submitted debt collection arbitrations.

FIGURE 26: CONSUMER CLAIM TYPES IN CREDIT CARD DEBT COLLECTION ARBITRATIONS 2010-12

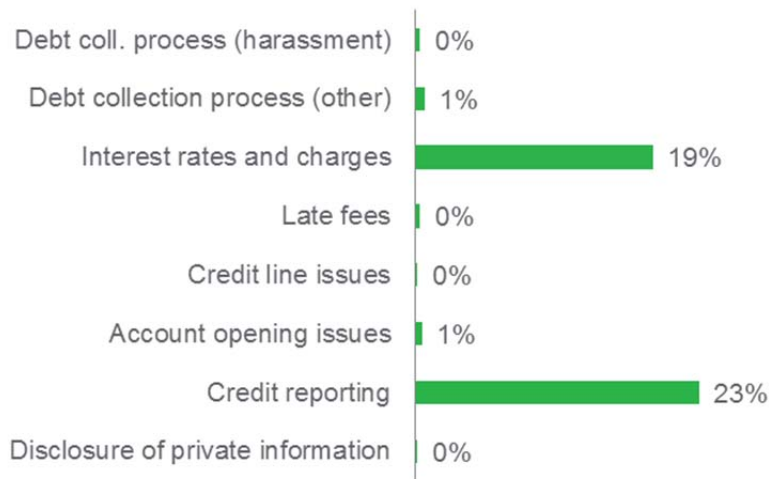


Note: 0% entries in Figure 26 reflect a single instance of the claim.

Figure 27 shows the subject matter of non-debt claims for credit cards.²⁰⁵ (We excluded substantive debt disputes from Figure 27 because, by definition, they were present in all these cases. In addition, we do not provide a separate break-out for payday and checking account disputes because almost all the debt collection arbitrations concerned credit cards.) In collection cases that raised affirmative non-debt claims as well as substantive debt disputes, we saw some recurring pleading forms used by consumer counsel across a share of those cases, just as we did for non-collection cases raising debt and non-debt disputes. There were more limited indications of common patterns across the debt collection cases in which the only claims concern the amount of debt owed.

²⁰⁵ We use “non-debt claims” expansively to include all affirmative claims made by the consumer. That includes FDCPA claims, unless the only basis of the FDCPA claim is that the amount of debt claimed is incorrect. If we identified a consumer FDCPA claim that lacked any further specification of the nature of the claim, we assumed for purposes of the subject matter typology that the claim related to the amount of debt asserted and did not otherwise challenge the process of collection. Absent that assumption, the debt collection subject categories in Figure 27 (and the debt collection process categories in Figure 22) would be larger.

FIGURE 27: CREDIT CARD DEBT COLLECTION ARBITRATION SUBJECT MATTERS 2010-12



Note: Entries showing 0% reflect either one or two cases.

4.7 Which consumers bring arbitrations?

We are not aware of scholarship attempting to characterize the demographics of consumers involved in consumer arbitrations. In the area of employment arbitration, however, scholars have addressed demographic issues in a number of ways. There has been some work to try and determine the income level of employee claimants in arbitration.²⁰⁶ There has also been work to address outcome variations across arbitrations filed by highly paid employees and lower paid employees.²⁰⁷ A number of studies have found significant variations in employment arbitration

²⁰⁶ See Hill, *Due Process at Low Cost*, *supra* note 169, at 794 (estimating that 43.5 % of employee claimants in an AAA sample of 200 awarded cases earned between \$14,000 and \$60,000).

²⁰⁷ See Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, *DISP. RES. J.*, Nov. 2003-Jan. 2004, at 48 (noting an employee “win rate” of 64.9% in AAA employment arbitrations that involve higher paid employees, and 39.6% in those involving lower paid employees). Building on this work, Choi and Eisenberg note that securities arbitration claimants have win rates between these levels. As an issue for future research, they comment that “this pattern may suggest that increased resources are associated with claimant arbitration success.” Stephen Choi & Theodore Eisenberg, *PUNITIVE DAMAGES IN SECURITIES ARBITRATION: AN EMPIRICAL STUDY* 535 (2010). Alexander Colvin has identified a 19.7% employee win rate in a data set of AAA employment arbitrations for which the “large majority” did not involve highly paid employees. See Alexander Colvin,

outcome according to whether the employee claimants were relying on arbitration clauses in individually negotiated contracts—which was likely to be the case when the claimant was a manager or executive—or instead on clauses in personnel manuals—which was likely to be the case for other employees.²⁰⁸ More recently, some work has asserted that a claimant’s gender makes a difference to employment arbitration outcomes.²⁰⁹ These various studies suggest that there may be value in trying to understand which consumers bring arbitrations in the consumer financial area.

To address this issue, we constructed a location-based income profile of U.S. credit cardholders.²¹⁰ To do this, we identified census tract data from a representative sample of U.S. credit cardholders using data from the Bureau’s Consumer Credit Panel, which provides a nationally representative, random sample of de-identified credit records procured from a large, national consumer reporting agency. Using the Census, we then obtained median income data for all the census tracts involved.²¹¹ (We do not have actual income data for any individual from the credit panel.) This provides an estimate for the percentage of U.S. credit cardholders that live in census tracts within certain median income ranges. This background income profile is shown in the darker green columns in Figure 28.

Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?, 11 EMPLOYEE RIGHTS & EMPLOYMENT POL’Y J. 418-19 (2007). A later Colvin study shows a similar win rate for analogous AAA employment arbitrations at 21.4%. *See* Colvin, *supra* note 169, at 6. This later study also shows win rates increasing with salary levels. For employees with salaries below \$100,000, win rates were 22.7%. They rose to 31.4% for employees with salaries between \$100,000 and \$150,000. For employees salaried at above \$150,000, win rates were 42.9%. *See id.* at 10-11.

²⁰⁸ *See* Lisa B. Bingham, *An Overview of Employment Arbitration in the United States*, N. Z. J. INDUS. RELS. at 13, 16 (June 1998). The AAA classifies employee arbitrations according to the type of underlying agreement: individually negotiated or in employer promulgated agreements. *See* Colvin, *supra* note 207, at 415. Bingham’s results were that employees won 68.8% of the former type of arbitrations, but only 21.3% of the latter type. *See id.*

²⁰⁹ *See* Lipsky et al., *supra* note 139. This study reports that the gender of the claimant and the claimant’s counsel had a “significant effect” on award size. The gender of the arbitrator did not. *See id.* at 314. The authors acknowledge that numerous explanations are possible for this observed effect, including discrepant settlement rates, lower seniority of female claimants, and greater seniority of male counsel. *See id.* at 320-22.

²¹⁰ Appendix B provides more detail about our methodology.

²¹¹ For 309 Census tracts, covering around 0.12% of the data relating to the overall credit card population, we had no reported median income.

We then constructed a location-based income profile of 420 consumers in non-debt collection credit card arbitrations.²¹² (We focused, first, on non-debt collection cases, but, as we discuss below, we also covered debt collection cases.) To build this profile, we determined a census tract location for filing consumers. Once again, we then used the Census to determine median income for that census tract. As a result, we do not have any actual income data for any consumer that filed an AAA arbitration. We show this information in the lighter green columns in Figure 28.

By plotting one distribution against the other, we were able to compare the median income of the locations involved in consumer arbitrations in the AAA Case Data with the median income of the locations of credit cardholders generally. Figure 29 shows the difference between the two distributions. Overall, we saw that locations with incomes below \$50,000 were less likely to account for credit card arbitrations than for credit cardholding overall. Locations with incomes above that level sometimes accounted for more credit card arbitrations than for credit cardholding overall, but not consistently so.

²¹² We were not able to associate census tract-based median income information for all of the 515 credit card non-debt collection cases. In some cases, the AAA case records did not provide sufficient location information. The analysis here, therefore, covers the 420 cases for which we were able to obtain such information.

FIGURE 28: MEDIAN INCOME OF CREDIT CARDHOLDER LOCATIONS AND LOCATIONS OF CONSUMERS INVOLVED IN NON-COLLECTION CREDIT CARD CONSUMER ARBITRATIONS 2010-12

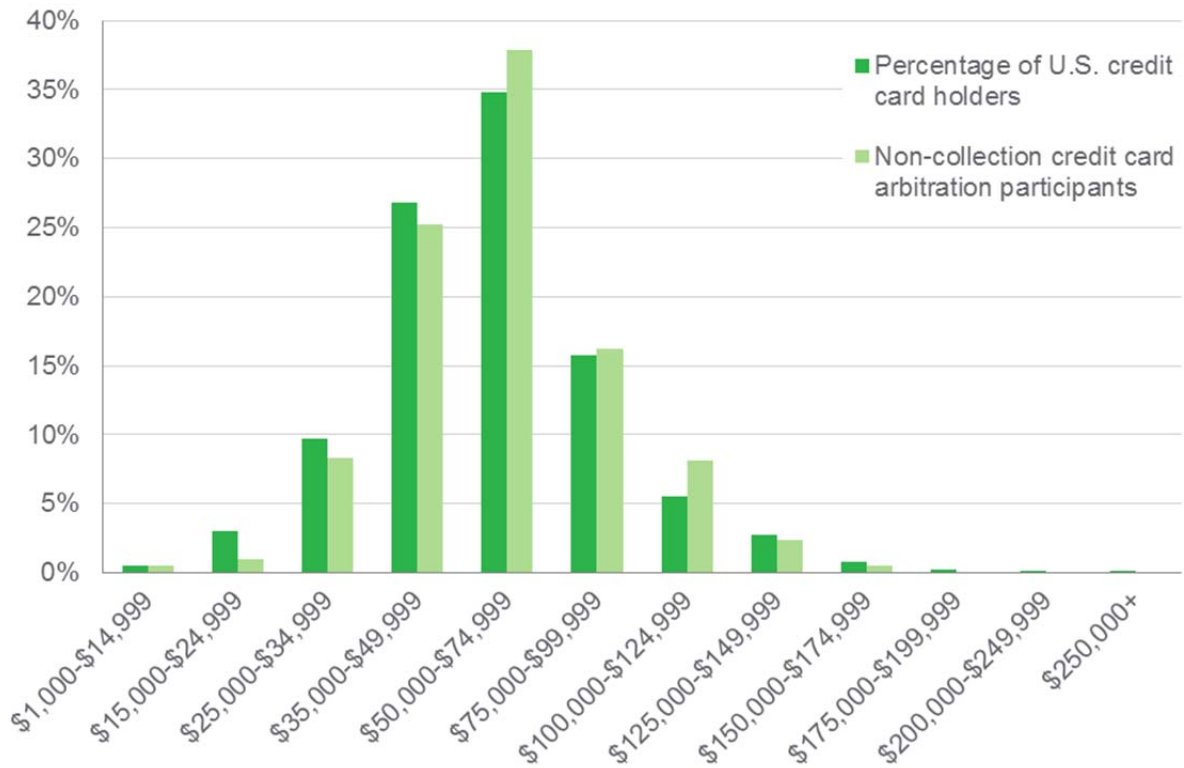
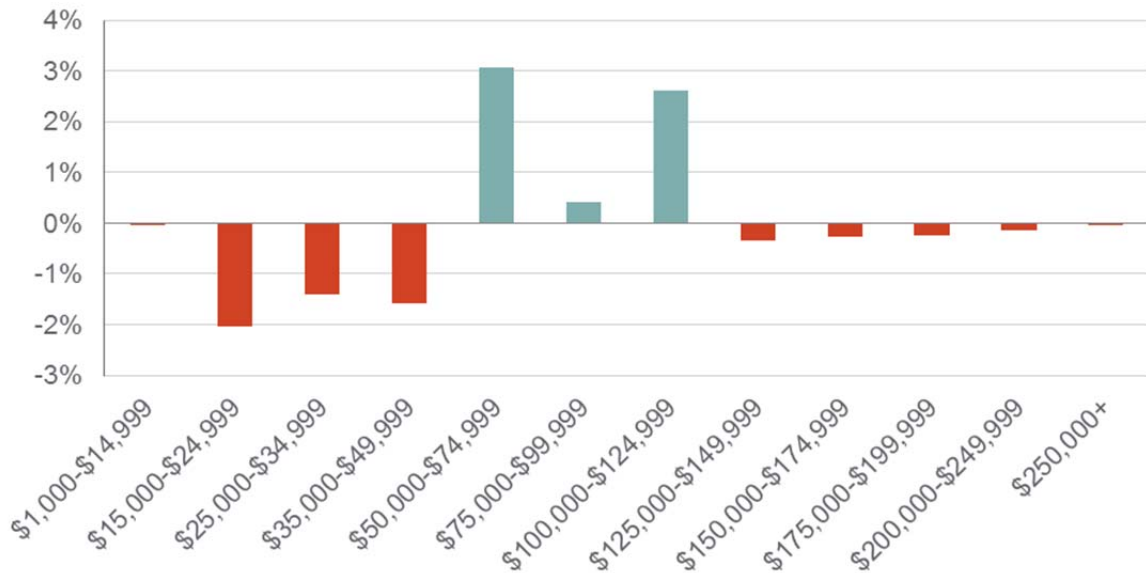


FIGURE 29: PERCENTAGE DIFFERENCES BETWEEN DISTRIBUTIONS IN FIGURE 28



We also reviewed all credit card arbitrations, including debt collection arbitrations. Such disputes might be expected to originate in poorer locations relative to the distribution of credit cardholders overall. But even including all credit card arbitration filings in this analysis—which are primarily debt collection disputes—we see a similar pattern. Consumers in such arbitrations—even when the disputes involve debt claims—were, relative to the cardholding population overall, disproportionately located in areas above \$35,000 in average income. Locations with incomes above that level sometimes account for more credit card arbitrations than for credit cardholding overall, but not consistently so. We show this analysis in Appendix D.

We were not able to follow this same approach for checking account and payday loan arbitrations because we do not have data that provides a proxy for the income level of users of these products by geographic distribution. We can construct distributions for the income level of areas that originate such arbitrations, but we can only compare these to the background distribution of income levels for all areas. As a result, we cannot control for the income level of the consumers that use these two products in the manner that we can for credit cards.²¹³

The AAA Case Data, therefore, may suggest that credit cardholders who arbitrate will tend to exceed a certain income threshold more than credit cardholders generally exceed that same threshold. It is important to note, however, that we cannot tell from our data whether or not the same was true for consumers in litigation.²¹⁴ Our data were not sufficient to address the issue comparatively. In addition, as noted in section 4.2.1, we worked from a relatively small set of arbitrations when compared to the overall credit cardholding population, which underscores the need for caution in interpreting this demographic data.

²¹³ Appendix D also contains the checking account and payday distributions. As might be expected, payday arbitrations are disproportionately filed from lower-income zip codes, which may reflect that lower-income Americans are the primary users of this product. Conversely, checking account arbitrations are disproportionately filed from zip codes with a median income of \$50,000 to \$74,999 in average income, which may reflect the higher income level of checking account users. (As discussed in the appendix, however, the distribution regarding checking account arbitrations contained the least number of data points—56.)

²¹⁴ Class litigation that results in an automatic distribution of relief to affected consumers, however, stands to provide some benefit to all income and demographic segments represented in the affected customer base.

4.8 Prior litigation

In some cases, the case record for a dispute in the AAA Case Data provides a clear indication of prior court proceedings. We discuss the available record on prior court litigation in this section.

4.8.1 Individual disputes

In credit card debt collection disputes, we were able to identify evidence of prior court proceedings in 97% of such cases. This is unsurprising given how we have defined debt collection arbitrations. In these cases, prior collection proceedings were the norm; in effect, the debt collection arbitration took the place of the preceding debt collection litigation.

Furthermore, leaving aside the mutually submitted debt collection cases, we have identified only eight debt collection cases in which there was a clear record that the company was the party to invoke arbitration in the prior litigation, indicating that in many of the debt collection cases the consumer was the party ending the litigation in favor of arbitration.²¹⁵ Although this may be a common pattern in the AAA Case Data, our Philadelphia County small claims court results gave some indication of how rare this consumer response to collection litigation may be overall.²¹⁶ There were more credit card collection cases filed by just two issuers in that county for 2012 alone than for all three years of credit card data in the AAA case records from 2010 through 2012.

In non-collection cases, by contrast, an indication of prior litigation is the exception, not the rule. We were able to identify from the AAA case records only 78 such cases, or 11% of the 718 non-collection arbitrations. In 19 of these 78 cases, the consumer appeared to have been the party to invoke arbitration as to the prior court proceeding. In the remaining 59 cases, the available indications were that the company was the party invoking arbitration as to the court proceeding.

It is important to note, however, that these results were based only on a review of the AAA electronic case record. We have not attempted to identify a preceding federal or state court case

²¹⁵ It is possible that in the absence of the moratorium, the company might have filed such disputes in arbitration directly.

²¹⁶ See section 5.3.

using electronic litigation case data.²¹⁷ Our data, therefore, may show false negatives on this point: there could be additional court proceedings that were not viewable from the arbitration record alone. In addition, we do not know how frequently companies move in court to invoke arbitration in individual proceedings and thus cannot assess the frequency with which such actions by companies lead to consumer-initiated arbitration cases.

4.8.2 Class disputes

A number of RFI commenters suggested that the Bureau compare the benefits to consumers from arbitration to the benefits from class action litigation.²¹⁸ In fact, the value of such a comparison is an area of relative agreement across RFI commenters, including consumer groups and members of the plaintiffs' bar. Some commenters noted that there is limited empirical data in this area.²¹⁹

The comparison can potentially be made along a number of different metrics, although the lack of small-dollar disputes in the AAA arbitration caseload may mean that at least some “apple to apple” outcome comparisons may not be available. The presence of prior class litigation proceedings, however, provides one point of potential comparison.

In damages class actions, applicable rules generally entitle potential class members to “opt out” of any proposed class.²²⁰ Unless a potential class member opts out, he or she will be bound by the resolution of the dispute. Potential class members, therefore, generally receive individual notice of their potential inclusion in a certified class, and are thereby given the opportunity to opt out.²²¹

²¹⁷ As several commenters pointed out, state court records are not consistently available across all state court jurisdictions via electronic means. There is no analog to PACER—the federal court record database—that covers all state courts.

²¹⁸ ABA/CBA/FSR RFI Comment at 3-4, 8 (stating that the Bureau should study whether “class actions provide meaningful benefit to individual consumers as compared with individual arbitration”).

²¹⁹ ABA/CBA/FSR RFI Comment at 8.

²²⁰ *See* FED. R. CIV. P. 23(c)(2)-(3).

²²¹ *See id.*

In many cases, however, notice will not be provided to potential class members until the parties have reached a proposed settlement. As a result, many class action notices will also include notice of a proposed settlement, laying out two broad options. A potential class member can take the offered class settlement terms, which will extinguish his or her right to bring individual proceedings on the settled claims. Alternatively, he or she can opt-out of the class action and the proposed settlement, and thus be free to pursue an individual case if he or she wishes to do so. Such “opt outs” are not bound by the terms of the class settlement releases. They receive no relief from the compensatory terms of the damages settlement. As they are not bound by the releases, they are free to press their own claim individually against the settling company. To preserve that right, courts that approve a class action settlement will typically publish a list of individual opt-outs by name.

Some class action settlements will occur in situations in which the individual consumer who opts out can bring a claim in arbitration.²²² Class proceedings will toll the applicable statute of limitations for putative class members to bring individual actions outside the class litigation.²²³ The class proceeding may have brought forward certain evidence bearing on the claims in the case. It may also have identified and tested certain legal theories, and it may have identified certain conduct as potentially actionable. In short, a certain amount of work will already have been done for any consumer who may have a preference for a potential arbitrated outcome over the proposed class settlement outcome.

Using electronic case databases, as well as blogs and websites that track class action settlements, we have identified eight class action damages settlements that meet the following criteria: first, final approval of the settlement took place from the latter half of 2009 or later; second, the contract at issue in the class action contained an arbitration clause that offered AAA as an arbitral forum; and third, the class action involved one of the three products covered by our existing AAA Case Data review. (Other class action settlements may also meet these criteria, but these are the ones we have identified to date.) Our criteria were intended to locate cases for

²²² This will generally only be the case where, for whatever reason, the defendant has either opted against invoking the arbitration clause in the class action or tried to do so and been unsuccessful in that effort. Had the defendant successfully invoked the arbitration clause as to the class action, there would be no class action settlement in court. In all eight of the cases identified below, one or more defendants attempted to invoke an arbitration clause but were not fully successful in that effort.

²²³ See, e.g., *Crown Cork & Seal v. Parker*, 462 U.S. 345, 352 (1983).

which we would be able to tell if consumers opted out and brought a AAA arbitration instead of applying for or receiving benefits under the class action settlement. In addition to the AAA Case Data for 2010 through 2012, we also had some AAA data for 2008, 2009 and 2013 that allowed us to check for potential overlap.²²⁴ Finally, none of the cases we identified involved pre-settlement notice to the class. Had they done so, opt-outs might have filed arbitrations earlier than the period of our review.

For all the cases below, we have looked through all three years of the AAA Case Data as well as the 2013 AAA data to count the number of consumers who opted out and pressed the same claim against one or more of the relevant defendants in arbitration before the AAA. For one case, for which notice was sent in November 2007, we also check AAA data for 2008 and 2009.

Thus far, we have identified three arbitrations in which an opt-out from one of these cases *may* have made the same claim in AAA arbitration against a party within the scope of the applicable settlement.²²⁵ No other opt-out from one of these cases appears to have filed the same dispute before the AAA. A total of 3,605 individuals opted out of these settlements. More than 13 million class members made claims or received payments under these settlements. Total payments or debt relief to the classes are in excess of \$350 million, exclusive of attorneys' fees and the value of injunctive relief. Further details on each of these class cases are provided below.

²²⁴ Because the detailed AAA Case Data were available from the beginning of 2010, we set late 2009 as the cut-off for final approval. For cases settled on that schedule, opt-outs bringing AAA arbitrations after final approval should generally be visible in the detailed 2010-12 case records.

²²⁵ We cannot be sure that these three opt-outs, in fact, pressed the same claim in arbitration. For two of these opt-outs, the potentially overlapping AAA arbitration was filed before 2010. For that period, we lack detailed case records, but the available AAA data record arbitrating parties matching two opt-outs. In addition, the relevant AAA arbitrations involved companies covered by the scope of the applicable class settlement. For these two opt-outs, therefore, it is possible that they were involved in follow-on AAA arbitration, but we lack the information to say whether that was the case. For the third opt-out, there is a match in the AAA case records and that arbitration involves the company that reached the relevant class settlement. However, even though we have the case record for this arbitration, the consumer's claims are stated only in very general terms. It is possible that these general terms were intended to capture one or more of the claims covered by the prior settlement, but we do not have enough information to say whether that was the case.

IN RE CURRENCY CONVERSION FEE ANTITRUST LITIGATION

The plaintiffs challenged foreign currency and other foreign transaction action fees imposed on payment card transactions.²²⁶ The defendants were Visa, MasterCard, and a number of large credit card issuers. Notice of the proposed settlement was sent to potential class members in November 2007.²²⁷ The settlement was “claims-made,” meaning that consumers had to submit claims to secure payments under the settlement.²²⁸ More than 10 million consumers submitted claims under the settlement. (Of these, more than 7 million consumers requested a flat fee payment of \$25, which was subsequently reduced to \$18 because of claim volume. Another 3 million consumers submitted more detailed claim materials, which entitled them to a significantly larger recovery.²²⁹) Overall, the settlement distributed around \$263 million to consumer members of the settlement class.²³⁰ The court entered final approval of the settlement in 2009, at which time the court excluded 2,878 individuals from the damages class.²³¹ Several of the defendants did not have AAA arbitration clauses during some portion of the relevant period, but most of the defendants had clauses up until the end of 2009, and one had a clause through the entire period. In addition, the settlement released all U.S. Visa and MasterCard members, not just the defendants, so the potential for arbitration was widespread.²³²

HOOPER V. ADVANCE AMERICA

The plaintiffs alleged violations of Missouri’s Merchandising Practices Act and Missouri’s payday loan statute.²³³ An arbitration clause accompanied the payday loan contracts provided by

²²⁶ *In Re Currency Conversion Fee Antitrust Litig.*, MDL Docket No. 1409 (S.D.N.Y., filed before J.P.M.L. Apr. 13, 2001).

²²⁷ *See* Decl. of Edward J. Radetich, Jr., CPA Regarding the Dissemination of Notice to the Class ¶ 7 (Jan. 28, 2008).

²²⁸ *See* Aff. of Edward J. Radetich, Jr., CPA Regarding Claims Administration at 5 (Sept. 14, 2011).

²²⁹ *See id.* at 4, 6.

²³⁰ *See id.* at 21.

²³¹ *See* Final Judgment & Order of Dismissal, Ex. A (Nov. 4, 2009).

²³² *See id.* ¶ 9.

²³³ *Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.*, No. 08-cv-04045-NKL (W.D. Mo. filed Mar. 10, 2008).

the defendant, and AAA was an arbitral forum offered in the contract. In July 2010, notice of a proposed settlement was mailed to potential class members.²³⁴ The court approved the settlement in November 2010, identifying 316 consumers who opted out of the settlement class.²³⁵ There were approximately 10,400 timely claims submitted. Claimants shared approximately \$520,000 in cash payments, and between \$3.8 million and \$9 million in debt forgiveness.²³⁶

HOFFMAN V. CITIBANK

The plaintiffs alleged that Citibank retroactively increased interest rates on certain customers' outstanding credit card balances in violation of several California laws.²³⁷ Citibank administered the settlement, and provided notice of the proposed settlement via statements.²³⁸ The court approved the proposed settlement in December 2010, identifying 140 opt-outs.²³⁹ At that point, the claims period was still open, so we have not been able to identify the final number of claims or the amount paid to class members. Class members were entitled to payments of \$18, subject to *pro rata* decrease if there was sufficient claims volume.²⁴⁰ At the time of final approval, when the claims period had several months to run, there were 12,500 claims, which suggests that the

²³⁴ See Decl. of Jennifer M. Keough Regarding Notice Dissemination in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement ¶ 3 (Oct. 27, 2010), ECF No. 65.

²³⁵ See Order and Final Judgment, Ex.1 (Oct. 27, 2010), ECF No. 68.

²³⁶ The \$520,000 is an estimate based on the following amounts: a \$2 million cash fund, less \$950,000 in attorney fees and costs, \$2,000 in service fees to class representatives, \$398,800 to *cy pres*, and the fund was offset by \$127,810 for dollar-to-dollar debt forgiveness for one subclass. See *id.* at 8; Memorandum in Support of Motion for *Cy Pres* Disbursement and Notice of Final Accounting at 2 (Dec. 29, 2010), ECF No. 70.

²³⁷ *Hoffman v. Citibank (South Dakota), N.A.*, No. 06-cv-00571-AG-MLG (C.D. Cal. filed Jun. 21, 2006).

²³⁸ See Supp. Decl. of Deborah L. Thompson re Claims Administration in Support of Final Approval of Settlement ¶ 2 (Dec. 15, 2010), ECF No. 86.

²³⁹ See Settlement Order and Final Judgment ¶ 6 (Dec. 22, 2010), ECF No. 95.

²⁴⁰ See Settlement Agreement at 10 (Apr. 22, 2010), ECF No. 61.

class received over \$225,000.²⁴¹ Citibank has maintained an arbitration clause providing for AAA arbitration throughout the relevant period.

KUCAN V. ADVANCE AMERICA

Plaintiffs alleged various violations of North Carolina law by a payday lender. A proposed state class settlement was reached in September 2010.²⁴² Notice was mailed in November 2010.²⁴³ In early 2011, the court entered final approval of the settlement, identifying 19 opt-outs.²⁴⁴ Advance America's loan contract included an arbitration clause that permitted AAA-administered arbitration. This was not a claims-made settlement—payments were made automatically to all class members. Approximately 135,000 class members shared approximately \$11.5 million.²⁴⁵

HAGER V. CHECK INTO CASH

Paralleling the claims in *Kucan*, plaintiffs alleged various violations of North Carolina law by a payday lender.²⁴⁶ The arbitration clause at issue allowed AAA to serve as the arbitral forum. A proposed settlement was reached in December 2010.²⁴⁷ Notice was sent in February 2011.²⁴⁸ Final approval was entered in April 2011.²⁴⁹ Ten consumers opted out of the settlement class.²⁵⁰

²⁴¹ See Supp. Decl. of Deborah L. Thompson re Claims Administration in Support of Final Approval of Settlement ¶ 3 (Dec. 15, 2010), ECF No. 86.

²⁴² *Kucan v. Advance America, Cash Advance Centers of North Carolina, Inc.; Advance America, Cash Advance Centers, Inc.; and William M. Webster, IV*, No. 04-CVS-2860 (N.C. Super. filed Jul. 26, 2004).

²⁴³ See Report by Settlement Administrator ¶ 3 (Jan. 18, 2011).

²⁴⁴ See Status Report & Mot. Requesting Entry of Final Judgment ¶ 2 (Jan. 18, 2011).

²⁴⁵ See Aff. of Settlement Administrator ¶¶ 2-3 (Jun. 26, 2013).

²⁴⁶ *Hager v. Check Into Cash of North Carolina, Inc. et al.*, No. 04-CVS-2859 (N.C. Super. filed Jul. 27, 2004).

²⁴⁷ See Settlement Agreement (Dec. 10, 2010).

²⁴⁸ Interim Status Report & Mot. Requesting Entry of Final Judgment ¶ 1 (Mar. 10, 2011).

²⁴⁹ See Settlement Order and Final Judgment (Apr. 15, 2011).

²⁵⁰ See *id.*, Ex. 1.

As in *Kucan*, there was no claims process and payments were made automatically to class members. Approximately 104,000 consumers shared more than \$7.6 million.²⁵¹

IN RE CHECKING ACCOUNT OVERDRAFT LITIGATION

In a number of cases consolidated in this multidistrict litigation in the Southern District of Florida, plaintiffs have challenged overdraft fees that were allegedly incurred as a result of the order in which the banks processed certain debit transactions.²⁵² Several banks have separately settled overdraft class actions. Of the defendants to settle so far, Chase, M&I, and Compass each have checking account agreements that provided for AAA arbitration.

Chase reached a proposed settlement in May 2012.²⁵³ Notice was mailed to class members in August 2012.²⁵⁴ The court gave final approval in December 2012, identifying 173 consumers who opted out.²⁵⁵ Most class members received automatic payments under the settlement, but class members were also entitled to submit claim forms for periods for which Chase lacked relevant records.²⁵⁶ The class had more than five million members, who received approximately \$61

²⁵¹ See Aff. of Settlement Administrator ¶ 2 (Jul. 1, 2013).

²⁵² *In Re: Checking Account Overdraft Litig.*, MDL No. 2036 (S.D. Fla., am. consolidated compl. filed Nov. 9, 2009).

²⁵³ See Pls.' Unopposed Mot. for Prelim. Approval of Class Settlement and for Certification of Settlement Class, Ex. A (May 22, 2012), ECF No. 2710-1.

²⁵⁴ See Decl. of Shannon R. Wheatman, Ph.D. on Implementation and Adequacy of Notices and Notice Plan ¶ 7 (Oct. 15, 2012), ECF No. 3010-5.

²⁵⁵ See Final Judgment, Ex. A (Dec. 19, 2012), ECF No. 3135.

²⁵⁶ See Order of Final Approval of Settlement, Authorizing Service Awards, and Granting Application for Attorneys' Fees at 9-11 (Dec. 19, 2012), ECF. No. 3134.

million in payments.²⁵⁷ As part of the settlement, Chase also agreed to restrictions on fees for transactions under \$5. The court valued this additional relief at \$52 million.²⁵⁸

M&I reached a proposed settlement in September 2012.²⁵⁹ Notice was mailed in January 2013.²⁶⁰ The court gave final approval in August 2013, identifying 34 opt-outs.²⁶¹ Class members, who numbered around 190,000, did not have to submit a claim form to share in \$2.7 million in cash relief.²⁶² The settlement also contained limits on charging fees for small overdrafts.²⁶³

Compass Bank reached a proposed settlement in March 2013.²⁶⁴ Notice was mailed in April 2013.²⁶⁵ Notice was sent to approximately 826,000 potential class members.²⁶⁶ The court

²⁵⁷ The \$61 million cash distribution is estimated as follows. The total cash to be distributed was \$110 million. The court awarded class counsel \$48.6 million, which was 30% of the total \$162 million value of the settlement, including injunctive relief. The settlement fund also covered \$309,326.50 for litigation expenses, and \$5,000 or \$2,500 service awards to each named plaintiff. *See* Order of Final Approval of Settlement, Authorizing Service Awards, and Granting Application for Attorneys' Fees at 39 (Dec. 19, 2012), ECF No. 3134.

²⁵⁸ *See id.* at 12.

²⁵⁹ Settlement Agreement (Oct. 1, 2012), ECF No.2981-1.

²⁶⁰ Decl. of Cameron R. Azari on Implementation and Adequacy of Settlement Notice Program ¶ 16 (Oct. 1, 2012), ECF No. 3279-5.

²⁶¹ Final Judgment, Ex. A (Aug. 2, 2013), ECF No. 3571.

²⁶² The \$2.7 million cash distribution is estimated as follows. The court awarded class counsel 30% of the total value of the settlement, which was \$4 million. It also awarded \$67,362.50 for reimbursement of litigation expenses, and \$2,500 service awards to each named plaintiff. *See* Order of Final Approval of Settlement, Authorizing Service Awards, and Granting Application for Attorneys' Fees (Aug. 2, 2013), ECF No. 3570.

²⁶³ *See* Settlement Agreement ¶ 50 (Aug. 2, 2013), ECF No. 3570.

²⁶⁴ Settlement Agreement, No. 09-md-02036-JLK (S.D. Fla. Mar.12, 2013), ECF No. 3330-1.

²⁶⁵ *See* Decl. of Cameron R. Azari on Implementation and Adequacy of Settlement Notice Program ¶ 15 (May 16, 2013), ECF No. 3469-5.

²⁶⁶ *See id.*

entered final approval in August 2013, identifying 35 opt-outs.²⁶⁷ Class members did not have to submit claim forms to share in approximately \$8 million in cash relief.²⁶⁸

With respect to the Compass and M&I settlements, we do not have significant AAA data to review because these settlements were approved so recently. We do, however, have some months of AAA data for the period immediately following class notice and can report that that period at least was insufficient to generate any pertinent AAA arbitrations.

4.9 Initial fee allocation

The consumer arbitrations reviewed by the Bureau are subject to the AAA's Due Process Protocol, which requires that arbitration be available to consumers at a reasonable cost.²⁶⁹ The AAA's Supplementary Procedures for Consumer-Related Disputes are intended to implement this and other requirements of the Protocol. Below we briefly describe the fee schedule that applied to consumer arbitrations filed with the AAA during the period of our review. The AAA changed its fee schedule effective March 1, 2013.²⁷⁰

²⁶⁷ Final Judgment, Ex. A (Aug. 7, 2013), ECF No. 3586.

²⁶⁸ The \$8 million cash distribution is estimated as follows. The court awarded class counsel 30% of the total value of the settlement, which was \$11.5 million. It also awarded \$106,300.20 for reimbursement of litigation expenses, and \$5,000 service awards to each named plaintiff. *See* Order of Final Approval of Settlement, Authorizing Service Awards, and Granting Application for Attorneys' Fees (Aug. 7, 2013), ECF No. 3585.

²⁶⁹ The AAA's Protocol states that: "Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay." Principle 6, AAA Consumer Due Process Protocol (Apr. 17, 1998) at 19, www.adr.org.

²⁷⁰ The revised fee schedule is relatively simple. At present, for cases subject to the Supplementary Procedures, consumers pay a non-refundable \$200 filing fee, regardless of who files the claim or of the amount at issue. In cases before one arbitrator, the company pays a partially refundable filing fee of \$1,500, which increases to \$2,000 in cases involving three arbitrators. The company also pays the arbitrator's compensation, which will be \$750 per arbitrator for a desk arbitration, and \$1,500 per arbitrator per day for arbitrations involving an in-person or telephonic hearing. The arbitrator can reallocate initial filing fees, arbitrator compensation, or other expenses to the consumer (or, with respect to the \$200 consumer filing fee, to the company), but only pursuant to applicable law or the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or was patently frivolous. The business pays a number of other fees, including a hearing fee and any hearing room rental fees. The consumer and

4.9.1 Initial fee schedule

Aside from attorneys' fees, there were generally two kinds of fees associated with AAA consumer arbitrations filed in the period 2010 through 2012. First, there were administrative fees payable to the AAA itself. Second, there were arbitrator's fees payable to the arbitrator.²⁷¹ Some portion of each of these fees was assessed at filing. (We refer to these as the "filing fees.") During the period of our review, all components of filing fees were either administrative fees or deposits towards arbitrator fees.

For the AAA to administer an arbitration case filed in the period of our review, each side was required to meet its initial fee requirements. The amounts and allocation of the filing fees during the applicable period are set out below. These filing fees were based on the amount of compensatory damages claimed or counterclaimed, not the amount of punitive damages, attorney fees, or any other amounts. Note that these are *not* the AAA's current filing fees for consumer arbitrations, which were revised effective March 1, 2013, and therefore did not apply to the cases that we reviewed.²⁷²

INITIAL FEES IN AAA CONSUMER ARBITRATIONS DURING RELEVANT PERIOD

Claims up to \$75,000

Regardless of who filed the arbitration, the consumer's initial filing requirements were up to \$125 for claims under \$10,000 and up to \$375 for claims between \$10,000 and \$75,000.²⁷³ This payment was made as a deposit to cover the consumer's share of the arbitrator fee; none of the payment was for administrative fees. The consumer could be refunded some or all of the

company must each pay a \$300 abeyance fee if a case is held as inactive for more than a year. Full details of the current fee schedule are available on the AAA's website, www.adr.org.

²⁷¹ California requirements call for publication of data about the amount and allocation of arbitrator fees. *See* Cal. Code Civ. Pro. 1281.96(a).

²⁷² *See supra* note 270.

²⁷³ Counterclaims that were below \$75,000 had no impact on the filing fees. Above \$75,000, however, they would be subject to the AAA Commercial Rules, as described below.

arbitrator's deposit if it were not to be used—for example, if the case were to settle before an arbitrator was appointed.²⁷⁴

The company incurred all administrative fees, which were \$775 for cases up to \$10,000 and \$975 for cases between \$10,000 and \$75,000. If a hearing were held, the company paid an additional administrative fee of \$200 for disputes up to \$10,000, or \$300 for disputes between \$10,000 and \$75,000.²⁷⁵ The company also paid all remaining arbitrator deposits, which ranged from \$125 for a “desk arbitration” (meaning an arbitration that is resolved on the basis of written submissions alone) or telephonic hearing to \$625 for an in-person hearing.²⁷⁶ Again, for claims up to \$75,000, these fees did not change with the identity of the filing party.

The company could receive some refund of its administrative fees and arbitrator deposits. Arbitrator deposits were refunded if not used. Administrative fees were refundable pursuant to the Commercial Fee Schedule.²⁷⁷ This required that \$350 in administrative fees were not refundable to the business, but the remaining administrative fees would be refunded in full if the case were settled or withdrawn within 5 days of filing. For cases settled or withdrawn between 6 and 30 days of filing, the refund was 50%. If the case settled or was withdrawn between 31 and 60 days of filing, the refund was 25%.²⁷⁸ If a consumer-filed case was withdrawn or settled before the consumer paid his or her initial fee, the company might not incur any fees at all.²⁷⁹

²⁷⁴ See AAA, Supplementary Procedures C-8 (effective Jan. 1, 2010), “Fees and Deposits to be Paid by the Consumer.”

²⁷⁵ For claims under \$10,000, the default rule is for the dispute to be resolved without a hearing. However, either party may ask for a hearing, or the arbitrator may independently decide that one is necessary. See AAA Supplementary Procedures C-5. Conversely, if the claim is for over \$10,000, the default is for the dispute to be resolved with a hearing. If both parties request no hearing, however, the arbitrator may waive the hearing requirement. See *id.* C-6.

²⁷⁶ AAA, Supplementary Procedures (effective Jan. 1, 2010) C-8 “Fees and Deposits to be Paid by the Business.”

²⁷⁷ See *id.*

²⁷⁸ AAA, Commercial Arbitration Rules and Mediation Procedures (effective Jan. 1, 2010) Administrative Fee Schedules.

²⁷⁹ One possible implication of this fee schedule is that it may have provided the consumer with certain forms of leverage. By filing an arbitration in this time period, a consumer that was willing to incur \$125 as an initial—though potentially refundable—fee could cause the company to incur a contingent obligation of up to \$1,725 for claims below

Claims above \$75,000

For consumer-filed claims above \$75,000, the consumer paid all the administrative fees, pursuant to the regular fee schedule in the AAA Commercial Rules, plus half the arbitrator's fee based on the arbitrator's usual rates, with a deposit of half the arbitrator's fee due on filing.²⁸⁰ (For a \$100,000 claim, for example, the consumer's initial administrative fees would be \$1,850 with an additional administrative fee of \$750 in the event a hearing is scheduled.²⁸¹ Arbitrator fees would be in addition to this amount.) The administrative fees were subject to refund per the terms of the Commercial Fee Schedule discussed above.

Conversely, for company-filed claims above \$75,000, the business paid the administrative fees based on the regular fee schedule in the AAA Commercial Rules, plus half the arbitrator's fee based on the arbitrator's usual rates, with a deposit of half the arbitrator's fee due on filing. For mutually submitted claims above \$75,000, the parties were required to allocate the applicable administrative fees between them.

Three-Arbitrator Panels

For the period in our review, the AAA charged a minimum fee of \$2,800 when the arbitration clause provided for a 3-arbitrator panel.²⁸²

WAIVERS AND ADJUSTMENTS

Although the applicable contract could reallocate initial fee burdens away from the consumer, it could not add to the consumer's initial fee burden without violating the applicable AAA rules,

\$10,000, and up to \$2,025 for claims between \$10,000 and \$75,000—albeit with the potentially significant caveat that, depending on the terms of the arbitration clause, some or all these company fees ultimately could be reallocated to the consumer at the discretion of the arbitrator. In addition, the consumer had some degree of control over the applicable contingencies. Once he or she paid the initial deposit, the company would incur a partially refundable administrative fee of either \$775 or \$975 and a refundable arbitrator fee of \$125. Up until that point, however, the company would not incur any fee obligation. Once an arbitrator had been appointed, the company would no longer be able to recoup the arbitrator fee and it would face additional costs of between \$825 and \$925 if the consumer successfully pressed for an in-person hearing.

²⁸⁰ AAA, Supplementary Procedures (effective Jan. 1, 2010) C-8 “Fees and Deposits to be Paid by the Consumer.”

²⁸¹ See *id.*

²⁸² See AAA, Commercial Rules (fees effective June 1, 2010) at 39. We identified two cases in which the AAA made an initial fee assessment of \$2,800 for a 3-arbitrator panel. In one case, the AAA assigned the company the full obligation. In the other, the AAA did not assign the obligation, but sought payment from the parties collectively.

including the Due Process Protocol. Some contracts, therefore, allowed for an advancement of the consumers' fees.²⁸³

The consumer could apply for a waiver of otherwise applicable fees.²⁸⁴ In the period of our review, the AAA allowed consumers to apply for a hardship waiver or deferral of any applicable administration fee if their gross annual income was below 200% of the federal poverty guidelines. The AAA rules also recognize California law providing for a waiver of arbitration of fees and costs, exclusive of arbitrator fees, for consumers with a gross monthly income of less than 300% of the federal poverty guidelines.²⁸⁵ For claims of any value, the consumer was also able to request an arbitrator willing to serve *pro bono*, although the rules did not guarantee that one would be provided.

In addition, as noted above, the arbitrator had discretion to reallocate administrative or arbitrator fees in the award, as he or she might deem appropriate.²⁸⁶ Unless the contract or applicable law required otherwise, the arbitrator might also reallocate attorneys' fees. The AAA fee schedule did not require any specific allocation of attorneys' fees.

4.9.2 Data

For the three product markets covered, Figures 30 and 31 show the fee amounts assessed at the front end of the AAA arbitrations from 2010 through 2012. These initial assessments are typically set out in AAA correspondence to the parties.

We have not determined if the parties paid the initial assessments reflected below. For example, it is possible that claims may have withdrawn or settled before the payment of all these initial

²⁸³ See section 3.4.10.

²⁸⁴ See AAA, Commercial Arbitration Rules R-49 (effective June 1, 2009, through October 1, 2013).

²⁸⁵ See CAL. CODE CIV. P. 1284.3 (cited in AAA, Supplementary Procedures C-8). The California waiver applies to all consumer agreements subject to the California Arbitration Act and to all consumer arbitrations conducted in California.

²⁸⁶ See Drahozal & Zyontz, *Empirical Study*, *supra* note 140, at 887-88 n.165; AAA, Commercial Arbitration Rules, Administrative Fee Schedule.

fees. In addition, we have not determined how fees were finally allocated in these cases.²⁸⁷ As discussed above, during the period of our review, the arbitrator had discretion to reallocate fees in the award, and final fee allocations may also address fee advances made at the front-end of the process. The amounts shown aggregate initial fees for each covered dispute. Thus, they may include administrative fees, arbitrator deposits, and any additional initial fees assessed to each party.²⁸⁸

FIGURE 30: DISTRIBUTION OF INITIAL CONSUMER FEE ASSESSMENTS 2010-12

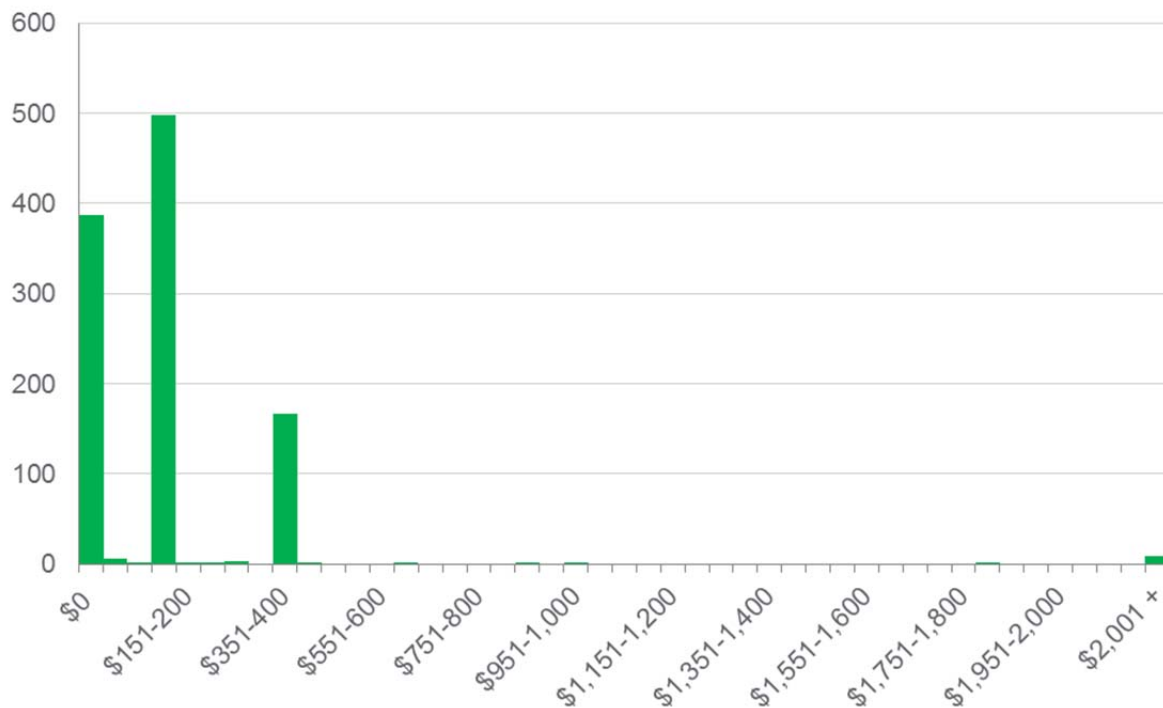


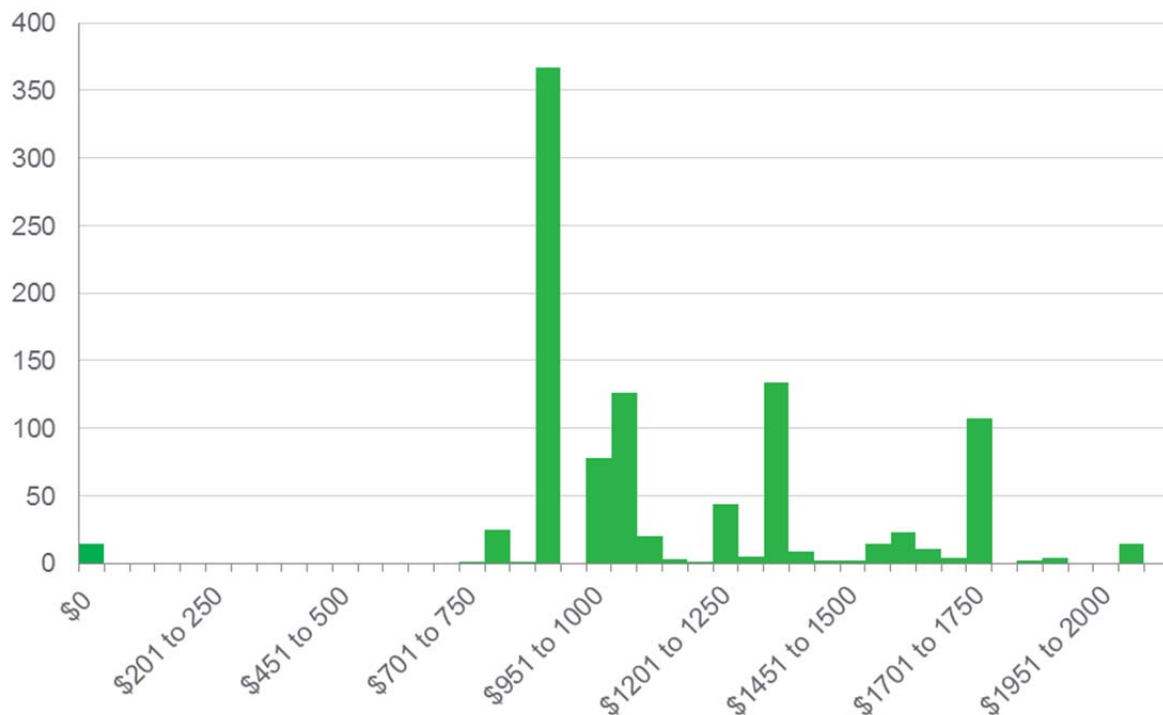
Figure 30 illustrates the initial distribution of consumer fee assessments. The figure does not include information about 161 disputes for which we were unable to identify information about

²⁸⁷ We plan to cover the ultimate distribution of fees in the next phase of our work.

²⁸⁸ For example, an entry reflecting \$1,100 in company fees may represent: administrative fees of \$775 plus \$125 for the arbitrator deposit plus \$200 for a live hearing; or administrative fees of \$975 plus \$125 for the arbitrator deposit.

the fees assessed to the consumer.²⁸⁹ It does include entries for 320 filings involving fee advance requests, nine involving AAA hardship requests, and 15 involving California waiver requests.²⁹⁰

FIGURE 31: DISTRIBUTION OF INITIAL COMPANY FEE ASSESSMENTS 2010-12



As noted, we have not completed our assessment of fees incurred during this period. Although consumer obligations would increase markedly above \$75,000, based on the schedule outlined, and consistent with the data shown, at lower claim amounts the consumer’s incurred obligation was significantly smaller, with the company bearing the predominant share of initial fee

²⁸⁹ In 129 of these 161 disputes, we were unable to identify specific initial fee assessments for either party. In the remaining 32 cases, we were able to ascertain that we were missing information on initial consumer fee assessments. We excluded data for one case in which the AAA sought payment of a \$2,800 initial fee for a three-arbitrator panel from the parties collectively, without specifically assigning this initial fee to one side or the other.

²⁹⁰ These various fee advance and waiver requests overlap in part.

obligations.²⁹¹ Figure 31 illustrates the initial distribution of fees assessed to companies. It does not include information relating to 229 proceedings for which we were unable to locate information about the fees assessed to the company.²⁹² It does include information relating to 317 fee advance requests, eight AAA Hardship Requests, and 15 California Waiver requests.

Finally, we also recorded the number of instances in which the AAA provided formal notice to the parties that it declined to administer the arbitration because of the company's failure to pay required fees or deposits. This formal notice also states that because the company has failed to comply with AAA policy on consumer arbitrations, the AAA will not administer further disputes concerning that company. The notice requests that the company remove the AAA from its arbitration clause. In the AAA Case Data, we observed 29 instances of companies receiving this letter. All but six concerned credit card disputes. Of the 29, all but one were consumer-filed disputes; the final dispute was a mutual submission.

²⁹¹ Filing fees are generally \$400 for United States District Courts. State court filing fees are more varied. One recent summary, "Civil Filing Fees in State Trial Courts April 2012," is available at www.ncsc.org, the website of the National Center for State Courts. That summary indicates that filing fees are under \$300 (and often significantly so) in almost all state trial courts. Small claims court fees are lower, typically on the order of \$20 to \$75, though in a few states exceed \$100 for larger claim amounts. *See id.*

²⁹² This excludes the same 129 cases for which we have no initial fee information, *see supra* note 289, as well as 100 cases for which we could ascertain that we were missing company initial fee information. It excludes the one case where the AAA sought collective payment of a \$2,800 initial fee associated with a three-arbitrator panel. *See supra* note 289.

5. Small claims court data

This section presents data from our review of small claims court filings. Our analysis draws on a number of different state and county small claims court databases. We reviewed these for suits filed against and by ten large credit card issuers, which collectively account for a very significant portion of the consumer credit card market.

We reviewed small claims court data for two reasons. First, as discussed in section 3.4.2, the clear majority of the arbitration clauses within our review, specifically recognize—and allow—access to small claims court as an alternative to arbitration.²⁹³ In addition, small claims courts are reported to handle a significant share of some disputes about consumer financial products.²⁹⁴ Furthermore, small claims courts are generally considered faster, cheaper, and simpler than ordinary trial courts of plenary jurisdiction, and are intended to be easier for individuals to pursue claims without using a lawyer.²⁹⁵ (In fact, some small claims court

²⁹³ Industry groups also urged the Bureau to study small claims courts, especially in the context of small claims court carve-outs to arbitration clauses. *See, e.g.*, Chamber of Commerce RFI Comment at 12-13 (“The study should compare the features of different types of arbitral and litigation forums, including . . . small claims courts.”).

²⁹⁴ *See* Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection*, 60 FLA. L. REV. 1, 27-28 (2008) (“[M]ost unsecured consumer debts fit comfortably within the jurisdiction of the limited-jurisdiction courts, and the overwhelming majority of suits are filed in these courts when they are available.”); *see id.* at 28 (noting that “the exclusion of courts of limited jurisdiction renders most prior studies inapplicable to the questions of how much consumer debt collection litigation exists and how it has changed over time.”).

²⁹⁵ *See* Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433 (1990); John C. Ruhnka & Steven Weller, *Small Claims Courts: A National Examination* at 2-3 (Nat’l Ctr. for State Courts 1978) (noting broad consensus as to the goals of the small claims court process, including “accessibility, speed, low cost, simplicity, self-representation, fairness, [and] effectiveness.”); John A. Goerd, *Small Claims & Traffic Courts: Case Management Procedures, Case Characteristics, and Outcomes in 12 Urban Jurisdictions* (Nat’l Ctr. for State Courts ed. 1992).

jurisdictions generally require parties to proceed without representation.²⁹⁶) We, therefore, wanted to see what use parties made of them with respect to consumer financial disputes.

Second, some commenters argue that the presence of small claims court carve-outs in arbitration clauses alleviates any need for any other litigation method to resolve small-dollar disputes.²⁹⁷ The argument is that small claims courts are “consumer friendly”²⁹⁸ so that having a small claims court carve-out helps endow an arbitration clause with “fundamental fairness.”²⁹⁹ Both the AAA’s Due Process Protocol and the JAMS Minimum Standards of Procedural Fairness, which are applicable to most consumer arbitrations, require that pre-dispute arbitration clauses permit access to small claims courts.³⁰⁰

²⁹⁶ See, e.g., California Department of Consumer Affairs, *Basic Considerations and Questions: What Is Small Claims Court?*, at http://www.dca.ca.gov/publications/small_claims/basic_info.shtml (visited Nov. 20, 2013) (“In most situations, parties to a small claims action must represent themselves. As a general rule, attorneys or non-attorney representatives (such as debt collection agencies or insurance companies) may not represent you in small claims court. Self-representation is usually required. There are, however, several exceptions to this general rule: If the court determines that a party is unable to properly present his or her claim or defense for any reason, the court may allow another individual to assist that party.”).

²⁹⁷ See Peter Rutledge, *Whither Arbitration*, 6 GEORGETOWN J.L. & PUB. POL’Y 549, 570 (2008) (asserting that the argument that a mandatory arbitration provision combined with a class action waiver denies consumers access to justice is exaggerated by noting that, amongst other things, most arbitration clauses provide access to small claims court); see also AFSA RFI Comment at 8 (“[M]any arbitration agreements will allow consumers to bring claims otherwise subject to arbitration in small claims court. Thus, for smaller claims, consumers frequently have a choice between arbitration and small claims court. This context is important in order to understand the dynamics of the claims that are (and are not) asserted in arbitration versus other methods of resolving disputes between consumers and covered persons.”).

²⁹⁸ ABA/CBA/FSR RFI Comment at 14.

²⁹⁹ ABA/CBA/FSR RFI Comment at 6. See also Mark Furletti, *Mandatory Arbitration Provisions in the Credit Card Industry* at 5-6 (Jan. 2003) http://www.phil.frb.org/consumer-credit-and-payments/payment-cards-center/events/workshops/2003/MandatoryArbitrationClauses_012003.pdf. Dean Roscoe Pound of Harvard Law School is often credited as being the first to articulate a vision of a court to “provide for disposing quickly, inexpensively, and justly of the litigation of the poor, for the collection of debts in a shifting population, and for the great volume of small controversies which a busy, crowded population, diversified in race and language necessarily engenders.” Commonwealth of Massachusetts, DISTRICT COURT DEPARTMENT OF THE TRIAL COURT, REPORT OF THE SMALL CLAIMS WORKING GROUP (Aug. 1, 2007) at 3, <http://www.lawlib.state.ma.us/docs/smallclaimreport.pdf> (citing Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 315 (1912-1913)).

³⁰⁰ The AAA’s Protocol states that: “Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction.” Principle 5, Consumer

5.1 Previous studies

We have not identified significant numbers of recent empirical studies on the incidence and nature of consumer financial claims in small claims courts.³⁰¹ Two older studies cover small claims courts in multiple jurisdictions, but neither report on the incidence of consumer financial disputes.³⁰² Some studies do suggest the companies make more use of small claims court than consumers do, but these are not specific to consumer financial products. Goerdts's 1992 study of 12 urban small claims courts showed that business-initiated disputes against individuals made up 53% of all cases studied; by contrast, individual-initiated disputes against businesses made up 13% of the sample.³⁰³ Similarly, in a 1990 study, Elwell & Carlson found that in the Iowa small claims court system many more businesses sued individuals than individuals sued businesses.³⁰⁴ In their sample of 1,802 disputes, individuals filed against companies in 4% of the

Due Process Protocol. The JAMS' Minimum Standards state that: "[N]o party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction." Minimum Standard No. 1, JAMS Minimum Standards. Explaining the basis for the carve-out, the Reporter for the AAA's Protocol indicated that "[t]he Advisory Committee concluded that access to small claims tribunals is an important right of Consumers which should not be waived by a pre-dispute ADR Agreement." AAA, Consumer Due Process Protocol at 18 (Apr. 17, 1998), *available at* www.adr.org.

³⁰¹ Using data from 2007, Drahozal & Zyontz randomly sampled 500 cases filed in Oklahoma small claims court, finding 336 disputes related to consumer debt cases, of which "330 were brought by creditors seeking to recover unpaid debts [and] only six were brought by consumers against businesses." Drahozal & Zyontz, *Creditor Claims*, *supra* note 140, at 88 (analyzing sample of cases closed between March 31, 2007, and January 1, 2008). Of the six consumer-initiated claims in Drahozal & Zyontz's sample, just one dispute involved a credit card. This same work cites to a number of older studies of small claims court proceedings that focus primarily on debt collection issues, including default incidence. *See id.* at 82 n.18.

³⁰² *See, e.g.*, Ruhnka & Weller, *supra* note 295, at 49-50 (allocating the subject matter of disputes in small claims courts in 15 cities into just five categories: "Consumer Plaintiff", "Seller Plaintiff", "Property Damage", "Landlord-Tenant," and "Other"); Goerdts, *supra* note 295, at 7 (analyzing small claims court data from the cities of Cambridge, Denver, Des Moines, Fairfax, Hartford, Minneapolis, Portland, Sacramento, San Diego, Seattle, Washington, and Wichita); *id.* at 47-48 (noting incidence of general categories of claims including, "consumer complaints" "debt collection, "torts," "housing," and "other").

³⁰³ Goerdts, *supra* note 295, at 7 (analyzing small claims court data from Cambridge, Denver, Des Moines, Fairfax, Hartford, Minneapolis, Portland, Sacramento, San Diego, Seattle, Washington, and Wichita); *id.* at 43-44 (showing filing rates by individuals and businesses).

³⁰⁴ Elwell & Carlson, *Iowa Small Claims Court*, *supra* note 295, at 487.

cases, and businesses filed against individuals in 47% of the cases.³⁰⁵ The significant use of small claims court for debt collection is well documented.³⁰⁶

5.2 Data sources

No centralized, comprehensive and searchable source of small claims court cases or dockets exists.³⁰⁷ Documents related to small claims cases are generally only available on databases maintained by the administrative staffs of the small claims courts themselves (or by physically requesting the materials from the clerk’s office). These databases appear to have been designed with individual litigants in mind. Working with these databases for the purpose of collecting large volumes of data is painstaking. This may be why there is such a dearth of empirical data and academic literature on the topic—or why such studies tend to look at fragmentary data.

Our main sources of data were online small claims court databases for states that offered free or reasonable cost access to case information. In addition to these cost criteria, we used three searchability criteria for the state court databases. To be included, such databases must: (1) purport to provide statewide data; (2) permit searches by party name (or ready identification by party if keyword searches are not possible); and (3) allow for by-year date sorting. Databases for 13 state jurisdictions and the District of Columbia met these criteria. We refer to this as the “state-level sample.” We identified 12 states via this method, plus the District of Columbia. We also added New York because with the exception of New York City—for which we were able to obtain data by other means, as described further below—it otherwise met these same criteria. The 14 jurisdictions in the state-level sample, excluding New York City, cover approximately 52 million people of all ages.

³⁰⁵ *See id.*

³⁰⁶ In 2007, a working group of Massachusetts trial courts judges and administrators “recognized that a significant portion of small claims cases involve the collection of commercial debts from defendants who are not represented by counsel.” Commonwealth of Massachusetts, District Court Department of the Trial Court, Report of the Small Claims Working Group (Aug. 1, 2007) at 3, <http://www.lawlib.state.ma.us/docs/smallclaimreport.pdf>.

³⁰⁷ There is no analog to the PACER system for federal courts. Westlaw and LEXIS provide limited small claims court data, mainly dockets, for certain jurisdictions. We used these to check our primary research. As of our search on October 16, 2013, Westlaw and LEXIS provided only a limited number of small claims court dockets, from one entire state (Wisconsin) and 9 counties out of the top 30 across two different states, California and Florida.

To supplement the state-level sample, we also used county-level data. We selected the 30 most populous counties in the United States, which largely included areas not in the state-level sample. We then reviewed all of the databases in that sample of 30 that met the same cost and equivalent searchability criteria as for the state-level sample: free or reasonably priced; searchable county-wide; searchable by party name; and restrictable by date. We refer to this as the “county-level sample.” Seventeen of the 30 counties met these criteria.³⁰⁸ These 17 counties include jurisdictions covering approximately 35 million people of any age. We are not aware of another study with coverage as broad as our combined county-level and state-level samples.³⁰⁹

In all these jurisdictions, we looked for potential credit card cases involving a set of 10 large credit card issuers. Given the relative concentration of the consumer credit card market, those credit card issuers cover a predominant share of that market.³¹⁰ In addition to covering very large players, our sample covers companies with small claims court carve-outs for both consumer and company claims (Citibank, Wells Fargo, USAA, and US Bank); non-mutual small claims court carve-outs, meaning that only consumers may require that a dispute be brought in small claims court (American Express and Discover); no small claims court carve-out at all (Fifth Third); and with no arbitration clause in 2012 (Bank of America, JPMorgan Chase, and Capital One).³¹¹

³⁰⁸ These added partial geographic coverage in six states not covered under our state-level review—California, Florida, Nevada, Pennsylvania, Texas, Washington—and coverage of a number of major cities or urban areas, including Houston, Philadelphia, and Silicon Valley. Three New York counties met these criteria as well; we included those results under the county search, not the New York state-level search.

³⁰⁹ Under the auspices of the National Coalition on State Courts, Ruhnka & Weller conducted a study in 1978 of 15 separate jurisdictions, mainly urban small courts. *See generally* Ruhnka & Weller, *supra* note 295. In 1992, also working with the National Center for State Courts, Goerdt conducted an analysis of 12 small claims and traffic courts in urban jurisdictions. *See generally* Goerdt, *supra* note 295.

³¹⁰ As of year-end 2012, our sample covers \$564.75 billion in credit card outstandings, which represents a predominant share of the consumer credit card market. Our sample for the small claims court analysis covers 84% of the outstandings covered by the credit card contract sample used for section 3. Concentration at the top-end of the credit card market has remained roughly the same over the last decade. *Compare* The Nilson Report, Issue #1,012 at 1, 8 (Feb. 2013) (as of 2012, top 10 accounted for 85% of market) *with* Hynes, *supra* note 294, at 51 (in 2004, top-10 accounted for almost 90% of market).

³¹¹ A small claims court carve-out is not necessary for either party to bring a claim in small claims court. Very few pre-dispute clauses require arbitration of all disputes. Instead, the clauses enable either party to invoke arbitration

As the issuers in our sample cover such a large share of credit card loans outstanding, we should uncover most consumer-issuer disputes involving credit card accounts in the small claims courts we selected. We will only uncover suits that can be filed in small claims court. The small claims courts covered by our review use a range of jurisdictional limits on the amount that can be claimed in small claims court. These limits—which are generally between \$2,500 and \$15,000—are laid out in detail in Appendix E.

To identify consumer credit card suits, we used small claims court dockets to identify cases filed by individuals³¹² against specific issuers and against colloquial names for these entities (such as “Bank of America” or “Chase”).³¹³ By attempting to capture all credit card suits filed by consumers against these issuers, our search will tend to be over-inclusive. It will include, for example, some consumer cases that are not about credit cards.³¹⁴ It should not, however, undercount consumer credit card cases against these issuers.³¹⁵ Our consumer-filed case numbers, therefore, can be seen as an *outer limit* on the number of consumer credit card cases against these issuers.

To identify suits that credit card issuers filed against consumers, we focused on suits in which the docket listed: (1) the correct legal name of one of the specific credit-card issuing

unilaterally. A small claims court carve-out, therefore, simply immunizes a small claims court filing from this potential effect of the arbitration clause. Entities with a clause but no carve-out, therefore, may still be sued or sue in small claims court. It is simply that the other party could then invoke arbitration, although that does not mean that the other party will do so.

³¹² We excluded cases filed by non-natural persons such as corporations or partnerships.

³¹³ We included potentially common misspellings, and alternative arrangements of character strings. We excluded suits by individuals against entities within the corporate family that included in their name terms such as “mortgage,” “home loan,” “auto,” and “insurance.” We would not expect such suits to be credit card cases.

³¹⁴ For example, we may capture consumer cases about checking accounts (at least if there are any in small claims court). As discussed in Appendix E, our searches using company names that a consumer might associate with our ten issuers will also uncover cases against eight of the largest U.S. retail banks.

³¹⁵ Our data do not capture credit card-related claims by these issuers’ cardholders against other parties besides the issuer. So we are not capturing claims against private label partners. It is possible that consumers intending to sue their “credit card company” sue such partners instead. For Philadelphia County, where detailed data are available, we did look for suits against the major retail partners of an issuer in our sample that has a large private label business. We did not find any such suits. In addition, our data also will not capture claims against (or by) debt collection companies that act for issuers or purchase debt from them.

subsidiaries³¹⁶ in our review; and (2) an individual as the defendant. This search will tend to over count such suits to the extent that any of the credit card issuers: (1) also provide consumers with products other than credit cards; and (2) that non-credit card activity causes companies to sue consumers in small claims court. However, our review of public data suggests that this effect should not be significant as to most of the issuers.³¹⁷

Further details about our sources and methodology are included in Appendix E.

5.3 Incidence

We start, first, with data from Philadelphia County and Alameda County. These were the two jurisdictions in our defined samples for which we were able to obtain underlying case documents on a systematic basis. These allowed us to establish, definitively, the nature of the claims at issue.

Using the broad case identification method outlined above, we identified for Philadelphia some 2,245 cases filed by issuers in our sample. (We identified no such cases in Alameda. In that county and in the rest of California, companies face severe limits on bringing collections claims

³¹⁶ Thus, if there was ambiguity in the name of the company claiming (*e.g.*, the docket identified the plaintiff only as “Chase” and not “Chase Bank USA, National Association”), we excluded the dispute from the company-filed results. Although we consider it reasonable to assume that outside or in-house counsel will ensure that companies sue using their correct legal name, to the extent that is not the case for credit card company suits, we will undercount such suits.

³¹⁷ According to call reports, at year end 2012, three issuers in our sample—American Express, Discover, and USAA—had *no* consumer loans other than credit card loans. Based on call reports, the other issuers we studied generally had as their primary business large consumer loans, such as mortgages, or smaller-dollar loans in the form of credit card borrowing. Our results from Philadelphia (*see* section 5.3) suggest that companies are unlikely to file mortgage-related claims in small claims court. Leaving aside mortgage, therefore, call reports indicate that most of the remaining issuers had a low volume of non-mortgage consumer loans compared to their credit card holdings. This is true for Citibank, National Association (\$106.7 billion in credit card loans and \$894 million in other consumer loans), Chase Bank USA, National Association (\$93.3 billion in credit card loans and \$616.3 million in other consumer loans), Capital One (\$77.8 billion in credit card loans and \$277.5 million in other consumer loans), and JPMorgan Chase, National Association (\$21.5 billion in credit card loans and \$3 billion in other consumer loans). Three of our ten issuers, however, had a significant volume of consumer loans other than credit cards: Bank of America, National Association and FIA Card Services, National Association (\$94.8 billion in credit card loans, \$26 billion in auto loans, and \$22.8 billion in other consumer loans), Wells Fargo Bank, National Association (\$16.3 billion in credit card loans, \$12.5 billion in auto loans, and \$8.9 billion in other loans) and Fifth Third Bank (\$2.1 billion in credit card loans, \$11.3 billion in auto loans, and \$445 million in other loans).

in small claims court.³¹⁸) By using the detailed review of actual pleadings available in Philadelphia, we were then able to establish that all but one of the company-filed cases were, in fact, credit card debt collection cases. This suggests that our broad methodology provides a reasonable, even close, approximation of issuer use of small claims court for credit card disputes against consumers.

Our broad case identification method also identified four Philadelphia cases and 39 Alameda cases as consumer-filed credit card cases against the issuers in our sample. When we reviewed the actual pleadings in these cases, however, none of the four Philadelphia cases involved an individual filing credit card claims against one of the ten issuers.³¹⁹ Reviewing the pleadings in the 39 Alameda cases, we identified only four that were clearly individuals filing credit card claims against one of the ten issuers.³²⁰ This suggests that our broad methodology may well overstate the actual number of small claims court cases filed by credit card consumers against our sample of issuers.

Even using the broad methodology, however, we see relatively low outer limit estimates for consumer-filed credit card cases. For our 31 jurisdictions combined, we were able to estimate an outer limit of 870 such cases for all of 2012.³²¹ We provide the detailed results of these searches in Table 10 in Appendix E. In only three jurisdictions was our outer limit estimate higher than 70 cases against all issuers combined, and the outer limit for any one issuer was 245 across all jurisdictions combined. The outer limit of 36 cases filed against one issuer in Orange County, California was the maximum for any one issuer and jurisdiction.

³¹⁸ See *infra* note 322.

³¹⁹ The four consumer-initiated cases involved (1) a stolen debit card; (2) certain mortgage payments not recognized as timely by the bank holding the mortgage; (3) an insurance claim; and (4) a tort that occurred in a bank (a bicycle hit a customer).

³²⁰ Thirty-two disputes manifestly did not involve credit cards. These were 17 disputes involving checking accounts; ten alleging interference with real estate listings; four about home loans; and one about insurance. Another three disputes might conceivably have involved credit cards, but the record was insufficient to show that they actually did so. One of these three cases did not clearly identify any product, and merely alleged in a single sentence FCRA violations by the issuer. The other two concerned unspecified “lines of credit.”

³²¹ This adjusts for the actual count in Philadelphia and Alameda counties.

Claims filed by credit card issuers against individuals show a different pattern. We report this data in Table 9 below. Claim numbers are either substantially lower or higher than the numbers of consumer-filed claims. The low numbers in Table 9 predominantly correspond to jurisdictions that impose substantial limitations on the use of small claims courts by businesses. These include California (here represented by Orange, Riverside, San Bernardino, Santa Clara, and Alameda Counties)³²² and New York.³²³ Other jurisdictions have certain procedures that, while not targeted explicitly at businesses, may dampen the number of company-initiated claims. For instance, in Utah, the clerk of court or a judge is empowered to remove multiple disputes filed by a same plaintiff from small claims court to the district court.³²⁴ In King County

³²² In California, corporations and partnerships may bring no claim larger than \$5,000 in small claims court, and no more than two such claims of more than \$2,500 per calendar year. *See* California Department of Consumer Affairs, Basic Considerations and Questions: What Is Small Claims Court? (last visited Oct. 25, 2013), http://www.dca.ca.gov/publications/small_claims/basic_info.shtml (“Corporations, partnerships, unincorporated associations, governmental bodies, and other legal entities cannot claim more than \$5,000. Also, no claimant (natural person or legal entity) may file more than two small claims court actions for more than \$2,500 anywhere in the state during any calendar year.”).

³²³ New York imposes various restrictions on legal entities filing in small claims court. A corporation or partnership may only bring a claim in small claims court if it has its principal office in New York state. Further, a corporation or partnership must submit a demand letter before filing a claim, and can file no more than 5 claims per calendar month. *See* Access to Justice NY Courts, Your Guide to Small Claims & Commercial Small Claims, <http://www.nycourts.gov/COURTS/nyc/civil/pdfs/smallclaims.pdf>. But the claims that corporations or partnerships cannot bring in New York small claims court do not disappear. Rather, it appears that they bring their would-be small claims disputes instead in Civil Court, the next court of limited jurisdiction. Of the 523,186 cases filed in Civil Court in the Bronx, Kings, Queens and Richmond Counties in 2006, 53% of these cases were categorized by one study as “consumer credit litigation.” *See* Urban Justice, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* 8 (Oct. 2007). Similarly, over half of the 320,000 cases filed in New York County Civil Court involved consumer credit. *See id.* (“More and more, New York City Civil Court is becoming a ‘credit card court,’ with over 50% of cases filed in that court arising out of ‘consumer credit transactions.’”) Based on a limited sample, the study estimated that 10.7% of “consumer credit litigation” cases were, in turn, initiated by the original creditors, including credit card issuers. Further, many if not most of these claims would have been under the small claims jurisdictional limit of \$5,000. *See id.* 14-16.

³²⁴ Utah Code Title 78A Chapter 8 section 102 (“If a person or corporation other than a municipality or a political subdivision of the state files multiple small claims in any one court, the clerk or judge of the court may remove all but the initial claim from the court's calendar in order to dispose of all other small claims matters. Claims so removed shall be rescheduled as permitted by the court's calendar.”).

(WA), attorneys and paralegals are not allowed to appear for either party without the judge's permission.³²⁵

TABLE 9: CREDIT CARD ISSUER SMALL CLAIMS COURT SUITS AGAINST INDIVIDUALS BY JURISDICTION 2012

	Citi	Wells	USB	USAA	AmX	Dis	5/3	BoA	Cap1	JPM	Total
Alaska	0	10	0	0	0	0	0	0	0	0	10
Connecticut*	262	8	0	0	91	718	0	301	4,274	0	5,654
Delaware	0	0	1	0	22	444	0	0	0	0	467
District of Columbia	76	1	0	0	22	115	0	21	865	0	1,100
Iowa	246	33	0	0	4	501	1	94	260	0	1,139
Minnesota	147	0	0	0	1	114	0	0	2,029	0	2,291
New Mexico	0	2	0	0	29	386	0	2	2	0	421
New Jersey	0	0	0	0	0	0	3	0	0	0	3
New York, ex-NYC	0	0	0	0	0	0	0	0	0	3	3
North Dakota	0	0	0	0	0	0	0	0	0	0	0
Oklahoma	0	4	0	0	0	0	*	0	0	0	4
Oregon	0	0	0	0	0	0	0	0	0	0	0
Utah	0	0	0	0	0	0	0	0	0	0	0
Wisconsin	704	96	48	0	76	2,162	27	1	9,361	14	12,489
Alameda (CA)	0	0	0	0	0	0	0	0	0	0	0
Broward (FL)	265	74	0	0	254	227	2	103	2,647	0	3,572
Clark (NV)	0	0	0	0	0	0	0	0	0	0	0
Harris (TX)	614	356	47	0	319	380	0	1,051	5,046	92	7,905
Hillsborough (FL)	70	0	1	0	67	125	1	0	1,325	57	1,646
King (WA)	0	0	0	0	0	0	0	0	0	0	0

³²⁵ See King County District Court Services, Information about Small Claims, <http://kingcounty.gov/courts/DistrictCourt/Smallclaims.aspx>.

Kings (NY)	0	0	0	0	0	0	0	0	0	0	0
New York (NY)	0	0	0	0	0	0	0	0	0	0	0
Orange (CA)	0	0	0	0	0	0	0	0	0	0	0
Palm Beach (FL)	174	15	0	0	177	306	0	86	1,594	2	2,354
Philadelphia (PA)	79	0	0	0	46	743	0	165	1,212	0	2,245
Queens (NY)	0	0	0	0	0	0	0	0	0	0	0
Riverside (CA)	0	0	0	0	0	0	0	0	0	0	0
Sacramento (CA)	0	0	0	0	0	0	0	0	0	0	0
San Bernardino (CA)	0	0	0	0	0	0	0	0	0	0	0
San Diego (CA)	0	0	0	0	0	0	0	0	0	0	0
Santa Clara (CA)	0	0	0	0	0	0	0	0	0	0	0
Totals	2,637	599	97	0	1,108	6,221	34	1,824	28,615	168	41,303

***Note:** Search results for Capital One in Connecticut exceeded 4,274, but further information beyond the 4,274 could not be retrieved from that database.

The higher numbers in our sample are present in jurisdictions that do not have similar limits on company filings. In addition, two issuers accounted for the vast majority of company-filed cases.³²⁶ This may be attributable to the fact that these two issuers are in the subprime credit card business, where smaller credit lines are the norm. It may also reflect other issuers making greater use of debt buyers or collection agencies. Other studies have also found relatively concentrated use by particular issuers of small claims court.³²⁷ Appendix E depicts these numbers relative to our outer-limit estimates for consumer-filed cases in different jurisdictions.

³²⁶ One of these issuers uses a non-mutual small claims court carve-out, which applies only to guarantee the consumer's right to remain in small claims court. The lack of mutuality in a clause, therefore, may not have any impact on company use of small claims court.

³²⁷ Beth Healy, Debtor's Hell, Part 2: A System Compromised, The Boston Globe (July 31, 2006), http://www.boston.com/news/special/spotlight_debt/part2/page4.html.

6. Future work

In addition to the work laid out above, the Bureau has a number of phases of work that are underway or that are under consideration for inclusion in the statutory report to Congress. We discuss each of these below.

- We will finalize our analysis of arbitration clause incidence and features. This may expand to cover some other consumer financial product markets.
- Subject to OMB approval, we plan to conduct a survey of consumers that addresses consumer awareness of arbitration clauses and consumer perceptions of and expectations about formal dispute resolution. The survey may also explore the role of formal dispute resolution terms in consumer product choice. (We have already published one detailed proposal in this respect, and have retained survey contractors. We have received a number of comments and plan to carry out focus group work. The proposal will be revised in light of the comments received, feedback from the survey contractors, and any focus group input. We will submit a revised proposal for additional public comment before we finalize the proposed survey.)
- We may review arbitration case record data for filings concerning disputes about other consumer financial products or services, such as private student loans.
- We will continue our review of litigation filings concerning consumer financial products. This may involve additional research into claims filed in small claims court. We will also review available federal court filings for select products, and, to the extent reasonably available from electronic sources, state court filings as well. We may use some sampling to control for case numbers. As with the arbitration filings work, this is intended to bring to light the types and frequency of claims that consumers bring to this method of formal dispute resolution. Viewed in conjunction with the same analysis for arbitration filings, this work may also help us to discern the impact of arbitration clauses on the incidence

and nature of consumer claims, although we cannot, by definition, directly observe claims that consumers may not have pursued at all because of the absence of a particular mechanism of formal dispute resolution.

- Once we have completed our front-end identification of consumer financial cases, we will consider how—if at all—we might meaningfully compare the disposition of cases across arbitration and litigation (including class litigation), both in terms of substantive outcome and in terms of procedural variables like speed to resolution. We recognize that it may be hard to identify comparable cases across these different alternatives, not least because cases are not randomly assigned to the different streams. In addition, numerous factors will affect variables like speed to resolution and substantive outcome that are independent of the formal dispute resolution mechanism used.
- As part of our outcome analysis, we are reviewing court records to assess the circumstances under which companies invoke arbitration clauses in response to consumer claims, and how that invocation may impact the outcome of such claims. One way we are exploring this issue is to try to identify consumer challenges that have been raised with respect to particular industry practices (or alleged practices) and then assess how dispute outcomes are impacted, if at all, by the presence of arbitration clauses and the availability of arbitration.
- We will use public court records to try to assess consumer benefits and transaction costs in consumer class actions involving consumer financial services. We will also attempt to evaluate whether class actions exert improper pressure on defendants to settle meritless claims. We intend to look at the outcomes of filed class actions, including settlements, and on dispositive and certification motion practices.
- We intend to assess the possible impact of arbitration clauses on the price of consumer financial products.
- We are also examining the interrelationship between public enforcement and private aggregate enforcement. Although some empirical research compares public enforcement and private class actions in securities and antitrust matters, we have not located empirical studies that compare these in the context of consumer law. Accordingly, we are conducting an empirical analysis in this area. It will consider the types of cases brought

by public and private actors, and the relationship between any actions against the same defendants or challenging similar conduct.

APPENDIX A

Clause incidence methodology

This appendix sets out the methodology used in collecting the data described in section 3.

CREDIT CARD AGREEMENTS

The sample of credit card agreements studied consists of credit card issuers with agreements on file with the CFPB as of December 31, 2010, 2011, and 2012. The Credit CARD Act of 2009 requires credit card issuers above a *de minimus* size to post their credit card agreements on the issuer's web page and to file the agreement with the appropriate regulator.³²⁸ Initially, the Credit CARD Act required the agreements to be filed with the Federal Reserve.³²⁹ The Dodd-Frank Act changed the requirement so that credit card agreements now must be filed with the CFPB.³³⁰

Issuers are required to update their filing only when it changes.³³¹ Some issuers have never filed new agreements, so the agreement they have on file has not changed since 2009. Other issuers file new agreements every quarter; for those issuers, the agreement studied is the agreement on file as of December 31, 2012. Many issuers have multiple agreements on file with the CFPB. In almost every case, the dispute resolution clause in each agreement filed by the issuer is identical. In the rare case in which an issuer has multiple agreements, the most frequently used type of agreement is included in the sample. In a handful of cases, the issuer filed some document other than the cardholder agreement with the Bureau. In those cases, the cardholder agreement was obtained from the issuer's website when possible.

³²⁸ Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1746, § 204(a) (May 22, 2009); *see* 15 C.F.R. § 226.58(c)(5) (*de minimus* exception).

³²⁹ Credit CARD Act, § 204(a).

³³⁰ *See* 15 U.S.C. § 1632(d).

³³¹ 15 C.F.R. § 226.58(c)(3).

Each credit card agreement in the sample was reviewed to determine if it included an arbitration clause.³³² If it did, the provisions of the arbitration agreement were coded for the information described in section 3. One issuer's agreement, while indicating that it included an arbitration clause, incorporated by reference the details of the arbitration clause included in another document, which was unavailable. That issuer's agreement was coded as providing for arbitration, but the details of the arbitration provision were coded as missing.

Data on credit card loans outstanding from the issuer's December 31, 2010, December 31, 2011, and December 31, 2012 call reports were used to measure the relative market share of each issuer. Only domestic credit card loans outstanding were used, plus securitized credit card loans, if any. Data for related issuers (*i.e.*, those that are subsidiaries of a common parent) were consolidated as long as each issuer used the same dispute resolution clause in its credit card agreement. If the issuers had different dispute resolution clauses, their data were not consolidated and each issuer was included separately in the sample.

CHECKING ACCOUNT AGREEMENTS

We examined three samples of checking account agreements: the 100 largest banks based on consolidated deposits less than \$250,000 (*i.e.*, the deposit insurance threshold); a random sample of 150 banks not among the 100 largest (referred to as small and mid-sized banks); and the 50 largest credit unions based on the amount of insured deposits. We used insured deposits as a proxy for consumer accounts.

For each sample, we first attempted to collect the institution's checking account agreement (typically its general deposit account agreement) from its web page. If the agreement was not available, or if the available agreement was undated or dated prior to 2011, the Bureau directed the institution to provide the agreement pursuant to section 1022(c)(4) of the Dodd-Frank Act.³³³ For all of the largest banks, 141 of the 150 small and mid-sized banks, and 49 of the 50 largest credit unions, we were able to obtain some version of its checking account agreement. From that agreement, we determined whether the institution used an arbitration clause, and, if so, coded it as described above.

³³² Agreements that provided for use of California's judicial reference procedure were not treated as including an arbitration clause.

³³³ 12 U.S.C. § 5512(c)(4).

As noted above, we used consolidated insured deposits, obtained from December 31, 2011 and December 31, 2012 call reports, as a measure of market share. As a general matter, insured deposits were consolidated across all affiliated institutions. If, however, affiliated institutions used different forms of dispute resolution or different arbitration clauses, we included each institution separately in the sample.³³⁴

GPR PREPAID CARD AGREEMENTS

As noted above, market data are much less complete for GPR prepaid cards than for either credit cards or checking accounts. We included in the sample all GPR prepaid cards (1) listed on the Visa, MasterCard, or NerdWallet web pages advertising such cards;³³⁵ or (2) examined in various recent studies of the terms of prepaid cards.³³⁶ We also included agreements from the two leading credit union GPR card programs, by PSCU and CUNA.³³⁷ Most of the cards in the sample (44 of 63, or 69.8%) were listed in multiple sources. We collected the cardholder agreements for the cards from the Internet, and excluded eight cards for which cardholder agreements were unavailable and three cards that had been discontinued.

Market share data came from the Aité Group's November 2012 report on the prepaid card market.³³⁸ Because of limited market share data, the results for GPR prepaid cards based on the dollar amounts loaded on the cards are limited to the firms for which market share data are

³³⁴ As a result, for example, our sample of the 100 largest banks includes 103 observations.

³³⁵ MasterCard, Get a Prepaid Card That's Right for You, <http://www.mastercard.us/get-a-prepaid-card.html> (visited Aug. 2, 2013); Visa, Get a Visa Prepaid Card, <http://usa.visa.com/personal/cards/prepaid/prepaid-card-online.html> (visited Aug. 2, 2013); NerdWallet, Prepaid Debit Cards, <http://www.nerdwallet.com/prepaid>.

³³⁶ Aité Group, *supra* note 62, at 18-19; Bankrate.com, 2013 Prepaid Debit Cards Survey, <http://www.bankrate.com/finance/banking/best-prepaid-debit-cards.aspx>; Bretton Woods, Inc., Analysis of Branded General Purpose Reloadable Prepaid Cards: A Comparative Cost Analysis of Prepaid Cards, Basic Checking Accounts and Check Cashing 9 (Feb. 2012); CardHub, Prepaid Cards Report – 2013, <http://www.cardhub.com/edu/prepaid-cards-report-2013/>; Consumer Reports, Prepaid Cards: How They Rate on Value, Convenience, Safety and Fee Accessibility and Clarity 9 (July 2013); Pew Charitable Trusts, *supra* note 40, at 26.

³³⁷ CUNA, Learn More About Our Prepaid Debit Cards, http://www.cunastrategicservices.com/ICUL_Service_Corporation_CUMONEY_Debit_Cards_134.html (last visited Oct. 17, 2013); PSCU, Prepaid – Reloadable Cards, <http://www.pscu.com/solutions/prepaid-reloadable-cards.html> (last visited Oct. 17, 2013).

³³⁸ Aité Group, *supra* note 62, at 19.

available, which make up 82.9% of the entire market.³³⁹ As a result, most of the prepaid cards in the sample are not included in the market share figures. Moreover, because two of the firms that are included use two different form cardholder agreements, the market share data sometimes are presented as ranges rather than as a single figure.

³³⁹ *Id.* at 18-19.

APPENDIX B

Arbitration data procedures

This appendix describes our methodology for reviewing the data described in section 4.

OVERVIEW

The AAA provided us with electronic documents from their case management records regarding all non-class consumer arbitrations from January 1, 2010 to February 2013. The AAA grouped these .pdf files together in folders by arbitration proceeding. Each folder could contain as few as one document to over 400 documents.³⁴⁰ The folders generally all contained some variation of the AAA claim form. Otherwise, there were few consistent markers across the documents. Accordingly, unless there was a cross-reference from another document, we would likely be unaware if documents were missing from the files. Sometimes folders simply stop, seemingly mid-way through a proceeding. As we will discuss in future work, it is difficult to tell from the case record whether such files reflect claimant withdrawals, settlements, or some other outcome.

We manually reviewed the documents to identify cases relating to our product markets of interest: credit cards, checking accounts, and payday loans. This process resulted in 1,241 folders (each representing a single consumer arbitration) relating to the credit card, checking, or payday loan markets from the years 2010, 2011, and 2012. We also identified four prepaid cases, which, to date, we have not considered further. We have begun to identify other product markets, such as student loan cases, that we may consider in future work.

³⁴⁰ For about two-dozen cases, we were not able to access one or more individual .pdf files provided by the AAA because of technical issues. We are working with the AAA to resolve this issue. It is unlikely that these documents contain information relating to the data we collected. Once we have resolved the issue, we will update our calculations as necessary, and reflect any changes in our statutorily mandated report.

Through multiple rounds of manual review, we then coded data points from each of the files within our product markets. For some data, the collection process was only an exercise in simple data entry: copying information from a particular standard document. In other cases, the required information was similarly objective, but required gathering information from multiple documents. And finally, one specific type of coding was necessarily more subjective. We discuss each of these three “tiers” of data collection below.

- Direct coding of information from claim forms provided our most “objective” data, as it allowed no room for interpretation. This process means that our results capture and reflect any errors in the original data.
- Objective coding across multiple documents was sometimes necessary for certain data points. For example, the claim forms may touch on descriptions of the parties’ claims or the amounts in dispute, but these descriptions may be more thoroughly elucidated in party-drafted summaries of claims, exhibits to claim forms, or correspondence from the parties or AAA. The supplemental documents also provided information not raised in the claim forms at all, such as fee assessments. Relying on documents outside of the claim form, however, introduces some risk of inconsistency because other than the AAA claim forms, the case folders did not contain other specific documents on a uniform or near-uniform basis.
- Finally, our attempt to code the subject matter of claims is more subjective. We used a maximum of three such subject matters from a set list for each dispute with the intent of capturing the essence of each dispute. The procedure was intended to cover a range of claim specification—from a very short case description in a hand-written arbitration filing to a 50-page complaint drafted by a team of lawyers in a different dispute. This process required a holistic review of each proceeding. To mitigate the risk of inconsistent coding across individual reviewers, we relied on multiple rounds of review.

DIRECT CODING FROM SINGLE DOCUMENTS

The information we directly coded from AAA claim forms includes but is not limited to:

- Party and representation information:
 - We coded this information for up to three parties on each side.

- We used a binary code to indicate whether more than three parties were involved on either “side.”
- We recorded whether the parties were represented by counsel (including in-house counsel for companies) and listed the names of any outside counsel.³⁴¹
- Basic case information:
 - We recorded whether the claimant(s) purported to represent one or more classes of claimants.
 - We listed the date of the claim.
 - If a case file had been closed and then reopened, we recorded the earlier date.
 - If the claim form lacked a clear statement about the date, we used other information, such as a date header created by a fax-machine, to approximate the date.
 - We recorded information from claim forms regarding the relief sought by the claimants:
 - We recorded whether claimants sought a specific amount of money; “at least” or “at most” certain amounts; or whether they sought a range of relief (*e.g.*, “\$1,000 to \$10,000”).
 - If a claim form attached a supplementary document, like a long-form complaint, and included instructions akin to “see attached” in the claim form itself, our claim form claim information includes data from those incorporated documents.
 - If the documents did not indicate a single overall claim amount for multiple claims, we followed the language of the claim form (and attached documents), with the exception that if multiple claims related to the same cause of action or statute, we would not sum separately delineated claim amounts.

³⁴¹ If any party changed counsel, we recorded the most recent counsel of record.

- In many cases, the parties described a specific debt amount in dispute. We recorded this number.
- We also recorded whether the parties sought injunctive relief, declaratory relief, or punitive damages.³⁴²
- We recorded who filed the claim. The AAA claim form has three checkboxes regarding “who filed,” indicating: consumer-filing, company-filing, or mutual-filing. We have not attempted to verify whether the checkbox selected on the claim form is an accurate reflection of the submission.
- We used the address of the first consumer in the AAA claim forms relating to credit card disputes to determine a relevant nine-digit zip code. We used that information to compare the median income of the consumers’ location against the median income of locations for the overall credit cardholding population. The home address information was entered into the U.S. Post Office’s on-line “Look up a Zip Code” tool.³⁴³ We did not record any address information about consumers in this process other than their nine-digit zip codes. If the consumers listed a P.O. Box as their address, we would use the nine-digit zip code for the P.O. Box. If they listed their attorney’s address, however, we did not include a zip code for them in our analysis.

DIRECT CODING ACROSS MULTIPLE DOCUMENTS

We looked to information outside of the AAA claim forms to record certain other information, including:

- Filing fees:
 - We recorded amounts for:
 - Initial administrative fees;

³⁴² We ultimately determined that our data was not sufficiently specific regarding injunctive relief, declaratory relief, or punitive damages for reporting purposes. Parties frequently indicated in their claim forms that they were seeking such relief, but there was rarely additional information regarding these requests. Similarly, the requests for punitive damages were often vague or unbounded.

³⁴³ <https://tools.usps.com/go/ZipLookupAction!input.action>.

- Neutral compensation (money paid by each party to the arbitrator); and
 - Any other fees.
- In gathering fee information, we also recorded instances relating to consumer fee waiver requests and fee advance requests.
- We recorded whether there was an indication of a prior litigation proceeding and, if so, who invoked arbitration as to that prior litigation proceeding. (By “invoking arbitration” as to prior litigation, we mean conduct that ends or stays the prior litigation by some form of reliance on an arbitration clause. We do not mean filing an arbitration *per se*.)
 - In many cases documents clearly showed that there was previous litigation and, in some cases, they spelled out who invoked arbitration as to those proceedings. For example, the arbitration record might contain a court order granting an identified party’s motion to compel arbitration. In other cases, the record would include documents showing that the consumer initiated the arbitration proceeding in lieu of filing an answer in state or federal court.
 - In one specific set of cases, we made an assumption about who invoked arbitration as to prior litigation. In those cases, the arbitration record: (1) had a clear indication of prior litigation; (2) indicated that only one side brought claims in the prior litigation; and (3) did not directly identify who invoked arbitration as to the prior litigation. When all three criteria were satisfied, we assumed that arbitration was invoked by the party who did not file the claims below. Our reasoning was that a party was unlikely to file a claim in litigation and then, in the absence of counterclaims, invoke arbitration as to its own claim or claims.³⁴⁴
- We have begun attempting to record information about claim amounts to the extent that they evolve over time prior to the arbitrator’s resolution or case closure for other reasons. This effort involves documents beyond the claim form and attachments to it.

³⁴⁴ In a handful of cases, we found case records that indicated that some companies filed complaints in litigation and then actually moved to compel arbitration regarding their own claims—even when there was no consumer counterclaim at issue in the court proceeding.

- We recorded instances where the AAA stated to a party that it had not complied with the AAA Due Process Protocol: *e.g.*, by not paying fees. We also recorded stated terminations by the AAA for failure to comply with the Protocol.

- We recorded basic information about the types of claim brought by each party, specifically whether they brought:
 - Federal statutory claims;
 - State statutory claims;³⁴⁵
 - Fraud claims;
 - Contract claims;
 - Tort claims;
 - “General, unspecified claims”: given the informal requirements for pleading in arbitration, we used this category to record consumer claims that were more colloquial in nature—such as “I want my money back,” “This is unfair,” or “I was discriminated against”—that the consumer did not identify as falling under any of the alternative options above; and
 - “Refutes debt”: we recorded instances in which consumers affirmatively claimed that they did not owe an alleged debt, at least to the extent that a consumer did not clearly state a contract claim to the same effect. If a consumer did not bring a claim to this effect, however, but simply faced a company claim in the arbitration for debt, then we did not use this notation. (The fields here were intended to capture claim types, not defenses.)

- We specifically noted instances when consumers brought actions under the following statutes:
 - The Alternative Mortgage Transaction Parity Act of 1982, 12 USC § 3801;
 - The Consumer Leasing Act of 1976, 15 USC § 1667;
 - The Electronic Fund Transfer Act, 15 USC § 1693;
 - The Equal Credit Opportunity Act, 15 USC § 1691;

³⁴⁵ As a subset of the statutory claims, we recorded instances where a party brought claims under an unfair or deceptive acts or practices statute or rule.

- The Fair Debt Collection Practices Act, 15 USC § 1692;
- The Fair Credit Billing Act, 15 USC § 1601;
- The Fair and Accurate Credit Transaction Act of 2003, 15 USC § 1601;
- The Fair Credit Reporting Act, 15 USC § 1681;
- The Homeowner Protection Act of 1998, 12 USC § 4901;
- The Real Estate Settlement Procedures Act, 12 USC § 2601;
- The Truth in Savings Act, 12 USC § 4301;
- The Truth in Lending Act, 15 USC § 1601;
- The Interstate Land Sales Full Disclosure Act, 15 USC § 1701;
- Antitrust statutes;
- The Credit Repair Organization Act, 15 USC § 1679;
- The Telephone Consumer Protection Act, 47 USC § 227;
- The Communications Act of 1934, 47 USC § 609; and
- The Racketeering Influenced and Corrupt Organizations Act, 18 USC § 1961.

CLAIM SUBJECT MATTERS

Finally, we attempted to identify the claim subject matter of each dispute, meaning a holistic statement about the essence of each arbitration filing. We worked with subject matter experts within the Bureau, who reviewed secondary sources and manually reviewed samples of complaints in federal and state courts, to help us identify different subject matter areas for disputes that might appear between consumers, on the one hand, and companies in connection with credit cards, checking accounts/debit cards, and payday loans, on the other hand.

We organized the subject matters by product in a general hierarchy to mitigate the risk of inconsistent coding across multiple reviewers. If application of this hierarchy would cause us to miss what we considered to be the “core” subject matters of the claims, then we deviated from it to allow for more accurate coding. For each case, we used a maximum of three fields in order to capture the “core” subject matters of the dispute. We did not use all three fields unless we thought that was necessary. (We frequently used under three.)

For Filings Relating to Credit Cards

We coded documents in the following priority order using our three fields. We also noted if: (a) the dispute related to other issues not listed among these choices; or (b) there was insufficient information to characterize the dispute. Not all of the subject matter categories actually appeared in our review of the AAA documents.

We could choose one of three different debt-related categories, if any applied:

- Substantive debt dispute – general claims about debt amounts owed or not owed (often brought by companies in the form of accounts stated or breach of contract claims; or brought by consumers as requests for declaratory relief that the consumers did not owe certain amounts alleged by companies). We also included in this category claims under the FDCPA if the only such claim was that the company misrepresented the amount of debt in its collection efforts. (If either of the following two debt categories applied, however, we did not also code the case as a “substantive debt dispute.”)
- Debt collection process (harassment) – allegations that a company called consumers after hours, used rude or obscene language, or made other threats during debt collection activity.
- Debt collection (process) – other claims relating to a company’s debt collection process, such as FDCPA claims that a company contacted consumers known to be represented by counsel.³⁴⁶

We also chose any of the following, to the extent that they applied:

Payments

- Payment allocation – allegations that payments were applied to the wrong balances (such as lower-interest rate balances);
- Payment period – allegations that a payment or grace period was too short; and
- Payment posting – allegations that the payment posting process was flawed in some respect, such as being too slow.

Promotions and special features

- Interest rate promotions;
- Balance transfer promotions;

³⁴⁶ Claims under the FDCPA that companies misrepresented the amount of debt owed, however, were classified as “Substantive Debt Dispute” claims.

- Convenience checks; and
- Add-on products.

Interest and Fee Issues

- Interest rates/charges;
- Late fees – this category was used, as opposed to “Interest Rates/Charges” when the allegations related solely to late fees, with no claims about interest rates;
- Foreign currency/transaction fees – allegations about foreign currency or transaction fees or exchange rate calculations;
- Annual/monthly fees; and
- Other fees.

Credit line issues

- Credit line increases/decreases;
- Account opening issues; and
- Account closing issues.

Improper transactions

- Unauthorized use of account – allegations that account was improperly used by known or unknown parties;
- Merchant-related billing error – allegations that a credit card company has failed to address alleged merchant failure to refund or correct consumers’ bills; and
- Set-off – allegation that party has set-off a credit card balance against some other account.

Information sharing and credit reporting

- Credit reporting;
- FACTA –if a dispute involved FACTA claims, we would not use the Credit Reporting (or the disclosure of private information) notation unless other claims required that we do so; and
- Disclosure of private information – allegations that information was improperly disclosed, at least outside the credit reporting context.

Other

- Discrimination;
- Telemarketing; and
- Antitrust/conspiracy issues.

For filings relating to checking accounts and debit cards

We used similar categories, including options to note that (a) the disputes related to other issues not listed among these choices or (b) there was insufficient information to characterize the dispute.

We could choose one of three different debt-related categories, if any applied:

- Substantive debt disputes;
- Debt collection process (harassment); and
- Debt collection process (other).

We also chose from the following:

Fee issues, generally

- Foreign currency/transaction fees;
- Annual/monthly fees; and
- Other fees (other than overdraft fees).

Overdraft issues

- Overdraft ordering/timing; and
- Other overdraft issues.

Account opening and closing

- Refusal to open;
- Other account opening/reopening issues; and
- Account closing issues.

Issues with Deposits

- Deposits – process issues – allegations that deposit process was flawed in some respect (*e.g.*, the consumer did not receive deposited funds within the proper time frame); and

- Deposits – other errors – allegations of substantive error in the deposit process (*e.g.*, that the consumer did not receive deposited funds in whole or in part).

Issues with Authorized Payments

- Authorized payments – process issues – allegations that payments process did not work properly (*e.g.*, process was contrary to representations); and
- Authorized payments – other errors –allegations of substantive payment error (*e.g.*, wrong person paid or not paid at all).

Payment error – unauthorized payments

- Unauthorized recurring payments – this also was used for allegations that a bank failed to honor stop payments on single checks;
- Merchant-related error;
- Improper set-off; and
- Other unauthorized use – this would cover failure to protect against fraudulent access; failure to address fraudulent checks, ACH, debit card, or ATM transactions; unauthorized use by known parties; or situations where consumers claimed that banks improperly provided funds pursuant to court order.

Information Sharing and Credit Reporting

- Credit reporting;
- FACTA; and
- Disclosure of private information.

Other

- Add-on products;
- Discrimination;
- Telemarketing Issues; and
- Antitrust/Conspiracy.

Finally, for filings relating to payday loans

We used similar categories, including options to note that (a) the disputes related to other issues not listed among these choices or (b) there was insufficient information to characterize the dispute.

Debt issues

- Substantive debt disputes;
- Debt collection process (harassment); and
- Debt collection process (other).

Account disclosures/breach of contract

- Failure to disclose or follow core terms – we defined core terms to mean the finance charge amount and the duration of the loan; and
- Failure to disclose or follow other terms – this would include disclosure issues relating to APRs; if a case fell into both this and the prior category, we would categorize the case as falling into this category.

Rollovers

- Rollover issues.

State regulatory requirements – we used only one of these four options at most, with priority leading from the beginning to the end of this list:

- Unlicensed lending activity;
- Excessive interest rates;
- Improper loan duration; and
- Loan amount above state cap.

Bank account debits

- Improper access to DDA (ACH); and
- Improper access to DDA (Check).

Refusal

- Refusal to issue or reissue loans.

Information sharing or credit reporting

- Credit reporting; and
- Disclosure of private information.

Product mischaracterization

- Product mischaracterization;
- Credit Service Organizations – allegations that state regulations violated; and
- Credit Service Organizations – allegations that federal regulations violated.

Other

- Add-on products;
- Discrimination;
- Telemarketing issues;
- Antitrust/conspiracy claims; and
- Other unfair loan practices.

APPENDIX C

Identifying credit card cases in federal district courts

As a basis of comparison, we reviewed pleadings in federal district courts for the years 2010, 2011, and 2012 to ascertain the number of consumer disputes relating to the credit card product market for those years. To gather pleadings for our review, we used the LexisNexis Courtlink database, which LexisNexis describes as the “largest collection of dockets and documents.”³⁴⁷ Courtlink search strings are limited to a maximum of either 32 words or 2,000 characters, whichever is reached first.³⁴⁸ Courtlink does not allow for the use of parentheses to control the order of operations of search terms. Accordingly, we crafted a deliberately overbroad text search in Courtlink, using a search string intended to identify documents that were credit-card related and likely to be pleadings. We followed that with manual review.

Our search string was:

“credit card” or “credit cards” or “charge card” or “charge cards” and complaint or crossclaim or counterclaim or crossclaims or counterclaims and not motion

Applying Courtlink’s order of operations, the search resolved in the following order:

[(“credit card” or “credit cards” or “charge card” or “charge cards”) and (complaint or crossclaim or counterclaim or crossclaims or counterclaims)] and not motion

³⁴⁷ <http://www.lexisnexis.com/en-us/products/courtlink-for-corporate-or-professionals.page> (“Search across the full text of more than 168 million federal and state court dockets and documents in a single click.”).

³⁴⁸ <https://courtlink.lexisnexis.com/Search/Single/SingleSearchHelp.aspx>.

The search, when applied against all of Courtlink’s federal district court data sets, returned more than 32,000 documents. We manually reviewed these documents to isolate complaints in federal court containing company-consumer disputes about credit cards.

We also coded other information, including:

- Whether the plaintiff purported to represent a class;
- The court in which the pleading was filed;
- The docket number;
- Whether a jury was requested;
- The filing date; and
- Whether the consumer or the company filed.

For manageability, we focused our review on initial complaints, not amended complaints. We also eliminated duplicate hits. At the end of that process, we identified 3,054 cases.

APPENDIX D

Additional arbitration data

This appendix contains additional data figures that are referenced in section 4.7.

Figures 32 and 33, which relate to all credit card consumer arbitrations (debt collection, along with non-debt collection) exclude credit card proceedings for which we were unable to associate census tract-based median income information. In some cases, the AAA case record did not provide sufficient location information. (For example, it might provide location information only for the consumer's counsel or debt settlement provider.) Thus, the analysis shown here is based on information from 911 credit card arbitrations.

Figures 34 and 35, which relate to checking account/debit card consumer arbitrations, similarly exclude arbitrations for which we were unable to associate census tract-based median income information. Thus, it is based on information from 56 checking account/debit card arbitrations. Finally, Figures 36 and 37, which relate to payday consumer arbitrations, exclude payday cases for which we were unable to associate census tract-based median income information. Accordingly, it is based on information from 123 payday arbitrations.

FIGURE 32: MEDIAN INCOME OF CREDIT CARD HOLDER LOCATIONS AND LOCATIONS OF CONSUMERS INVOLVED IN CREDIT CARD CONSUMER ARBITRATIONS 2010-12

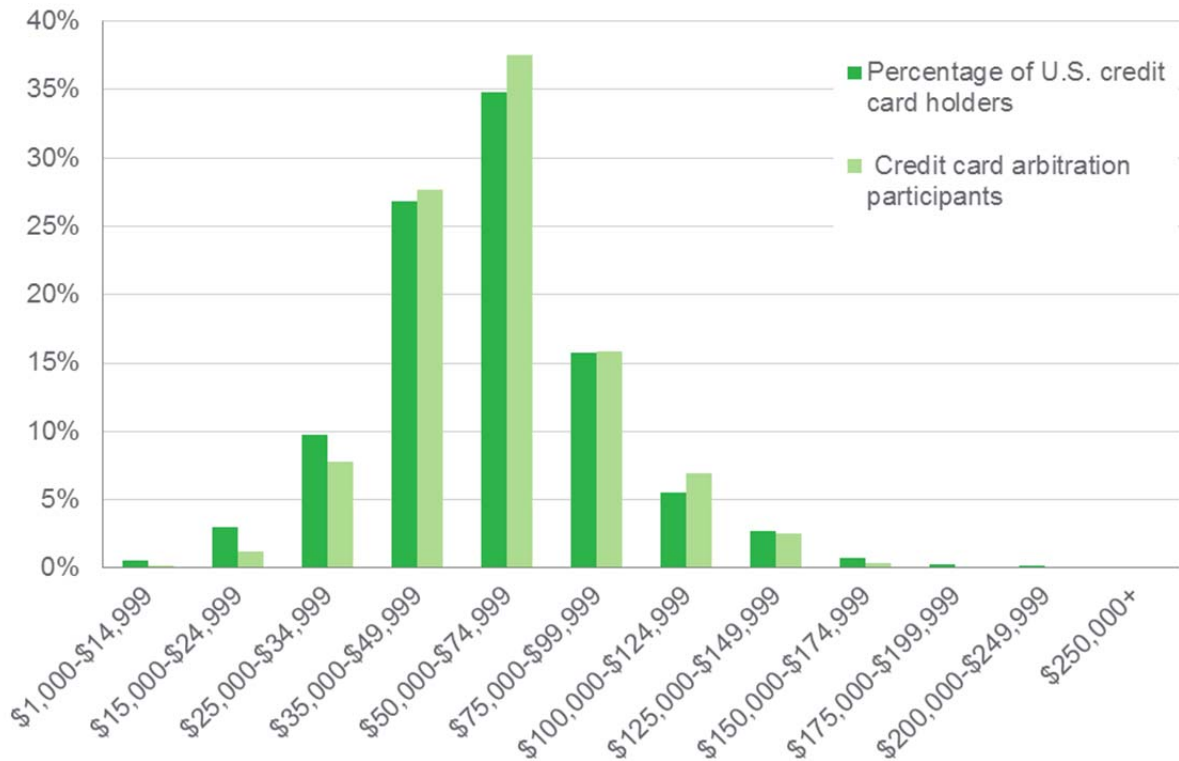


FIGURE 33: PERCENTAGE DIFFERENCES BETWEEN DISTRIBUTIONS IN FIGURE 32, CREDIT CARD ARBITRATIONS

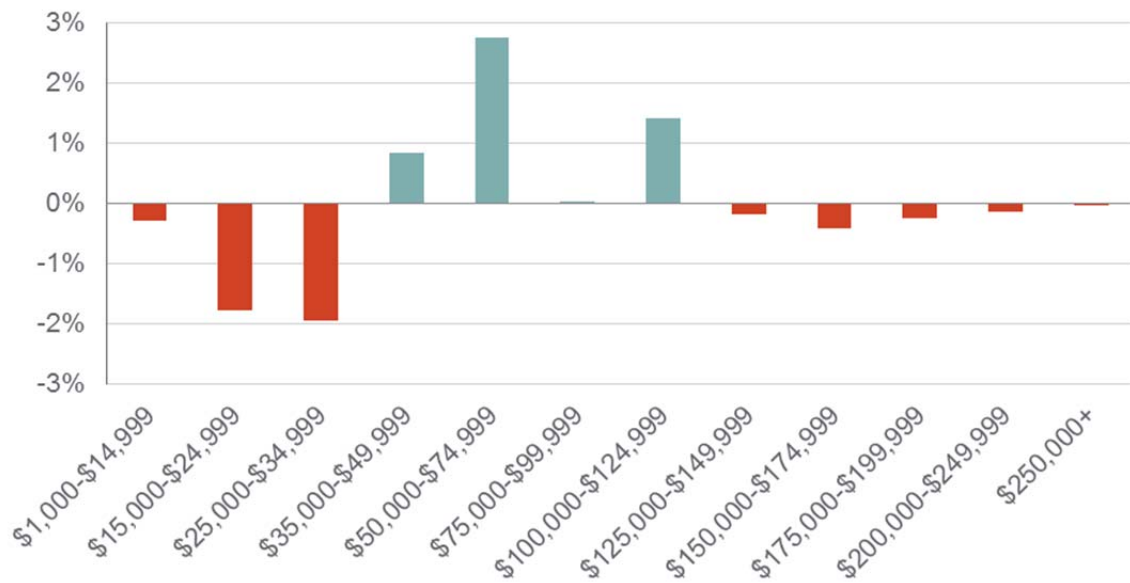


FIGURE 34: MEDIAN INCOME OF U.S. CENSUS TRACTS AND LOCATIONS OF CONSUMERS INVOLVED IN CHECKING ACCOUNT/DEBIT CARD CONSUMER ARBITRATIONS 2010-12

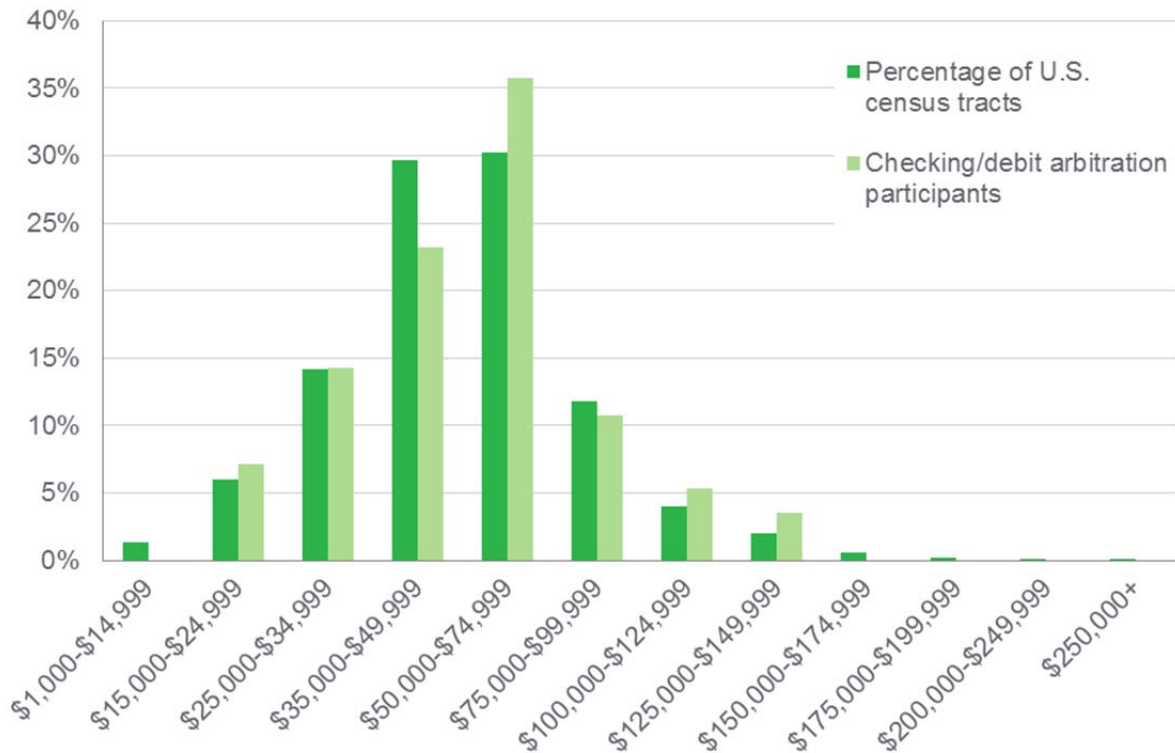


FIGURE 35: PERCENTAGE DIFFERENCES BETWEEN DISTRIBUTIONS IN FIGURE 34, CHECKING ACCOUNT/DEBIT CARD ARBITRATIONS

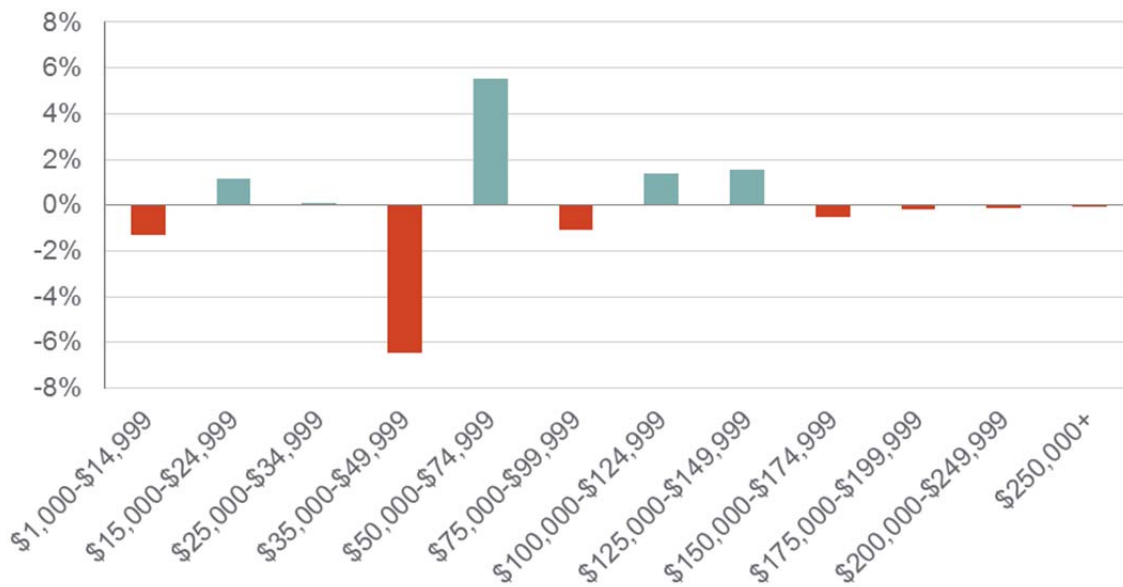


FIGURE 36: MEDIAN INCOME OF U.S. CENSUS TRACTS AND LOCATIONS OF CONSUMERS INVOLVED IN PAYDAY CONSUMER ARBITRATIONS 2010-12

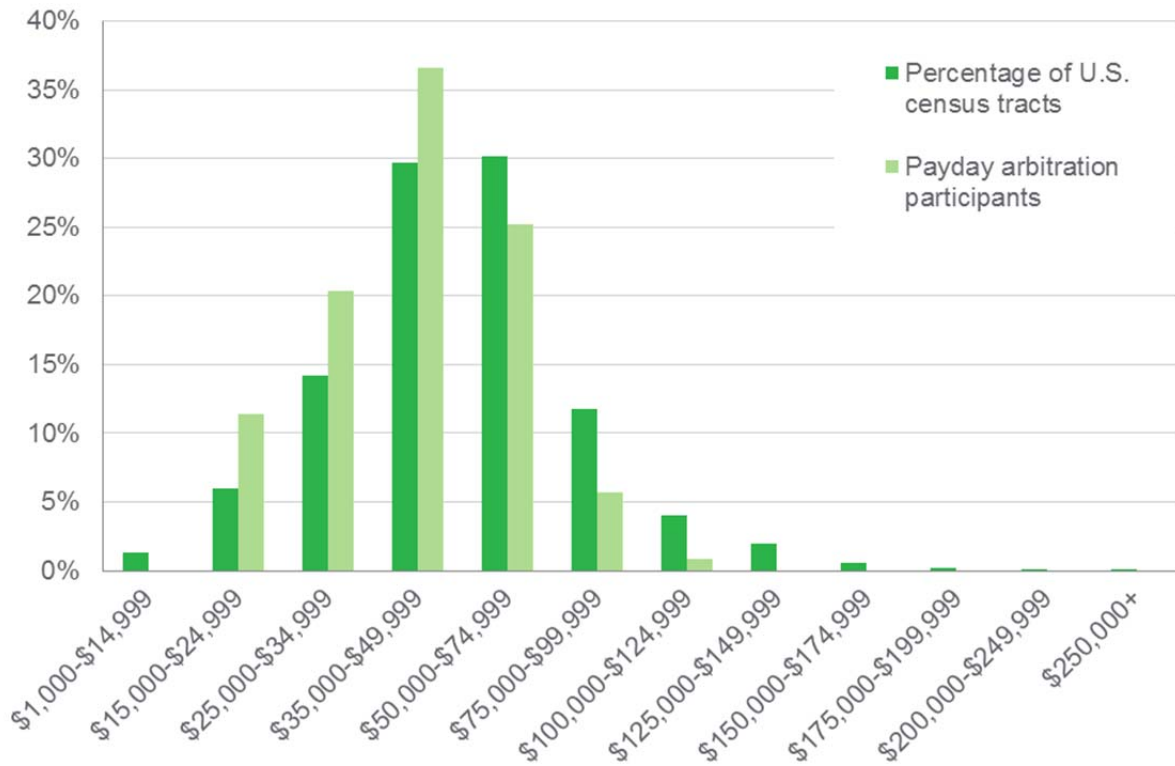
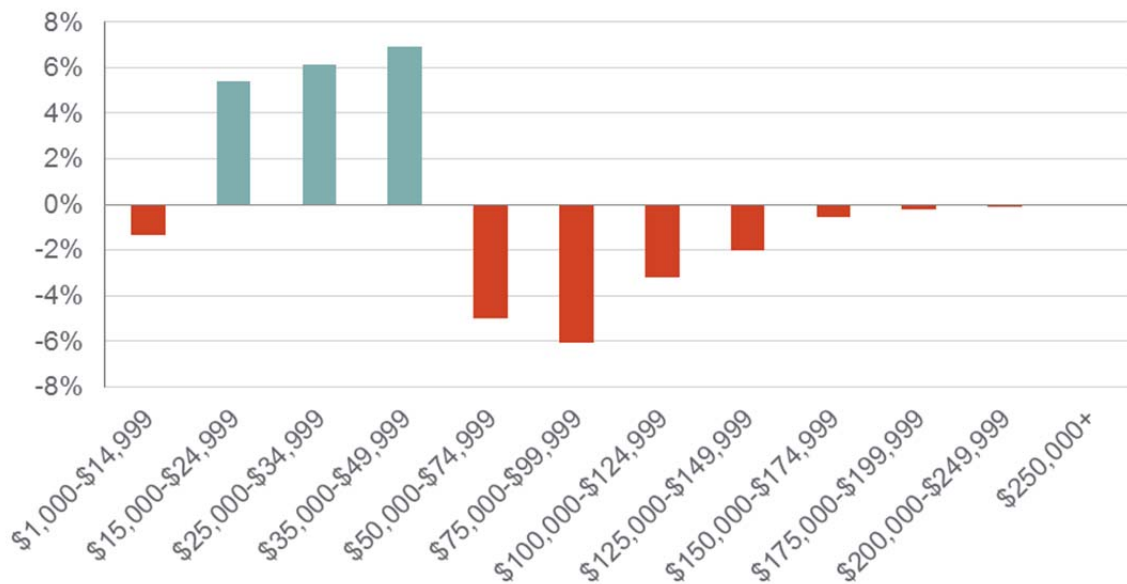


FIGURE 37: PERCENTAGE DIFFERENCES BETWEEN DISTRIBUTIONS IN FIGURE 36, PAYDAY ARBITRATIONS



APPENDIX E

Small claims court data and methodology

This appendix provides additional data for section 5. It also provides a more detailed description of our methodology.

DATA BY JURISDICTION

Table 10 shows data by jurisdiction for our estimated outer limit on consumer claims against our credit card issuer sample.

Our issuer sample covers on the order of 84% of the credit card market measured by outstandings.³⁴⁹

We have included for each jurisdiction the estimated annual volume for credit card direct mail for the issuer sample overall, using data from a commercial provider.³⁵⁰ Those volume numbers show that our issuer sample collectively has a significant presence in each jurisdiction, at least from a marketing perspective.³⁵¹ It is true that a low number of claims *for a specific issuer* in a particular jurisdiction may reflect a lack of issuance *by that issuer* in that area. To address this issue, we have noted with an asterisk every instance in which a specific issuer had no direct mail volume for 2012. Our review sample only includes one predominantly regional player. The rest are national issuers. So this effect is primarily isolated to that one issuer.

³⁴⁹ See *supra* note 310.

³⁵⁰ Data were available only by state. For counties, therefore, we assume that a county's population share in the state is equal to its share of direct mail.

³⁵¹ In addition, for every jurisdiction, the direct mail numbers demonstrate that our sampled issuers *collectively* have a significant presence.

TABLE 10: INDIVIDUAL SMALL CLAIMS COURT SUITS AGAINST ISSUERS 2012

	Citi	Wells	USB	USAA	AmX	Disc	5/3	BoA	Cap1	JPM	All Issuers	2012 Mailings per Mintel
Alaska	1	0	0	0	0	0	*	2	0	0	3	n/a
Connecticut	0	2	0	0	0	0	*	4	0	5	11	129,650,753
Delaware	1	0	0	0	0	1	1	1	1	0	5	15,665,346
District of Columbia	2	4	0	0	0	0	*	2	1	0	9	40,875,797
Iowa	1	3	4	0	0	0	*	1	5	3	17	125,424,333
Minnesota	0	17	5	2	0	1	*	1	0	0	26	260,603,424
New Mexico	0	1	0	1	0	0	*	0	0	0	2	36,658,268
New Jersey	5	19	0	3	2	0	*	17	2	9	57	271,344,574
New York, ex-NYC	13	9	0	0	0	0	0	18	6	21	67	70,238,046
North Dakota	0	0	0	0	0	0	*	0	0	0	0	378,259,494
Oklahoma	0	0	0	1	0	0	*	0	0	3	4	110,984,476
Oregon	0	6	2	1	0	0	0	3	1	1	14	156,191,952
Utah	1	5	1	1	0	0	*	1	0	1	10	116,951,853
Wisconsin	1	1	1	0	0	0	0	2	0	3	8	253,280,825
Alameda (CA)*	1	0	0	0	3	0	*	2	0	1	7	57,290,710
Broward (FL)	1	0	1	0	0	0	0	17	0	4	23	59,396,856
Clark (NV)	1	2	0	1	1	0	*	6	1	0	12	40,677,128
Harris (TX)	1	2	0	1	2	0	*	9	6	11	32	118,398,987
Hillsborough (FL)	0	9	0	1	0	0	0	12	1	4	27	41,767,393
King (WA)	0	8	1	1	0	0	*	4	0	13	27	71,826,030
Kings (NY)	11	2	1	0	9	1	0	13	7	32	76	84,569,238
New York (NY)	15	2	0	0	9	0	0	12	2	27	67	53,545,763
Orange (CA)	8	14	7	0	1	0	*	36	1	11	78	114,190,320
Palm Beach (FL)	0	9	1	25	5	0	0	5	2	4	51	44,856,321
Philadelphia (PA)*	0	0	0	0	0	0	0	0	0	0	0	58,925,778
Queens (NY)	8	3	0	0	3	0	0	8	10	4	36	75,318,585
Riverside (CA)	4	8	4	0	1	0	1	32	1	8	59	83,061,972
Sacramento (CA)	2	9	2	0	1	0	*	0	1	5	20	53,820,389

San Bernardino (CA)	0	5	4	0	0	1	*	11	0	4	25	77,203,777
San Diego (CA)	6	28	6	1	1	0	*	20	2	14	78	117,417,788
Santa Clara (CA)	0	2	0	0	1	0	*	6	2	8	19	67,584,914
All jurisdictions	83	170	40	39	39	4	2	245	52	196	870	

The two figures below combine the data from Table 9 in section 5.3 with the data from Table 10 above. Figure 38 shows the data from the jurisdictions that do not limit or bar the use of the small claims courts by companies. In these jurisdictions, company-initiated claims uniformly outnumber our outer limit estimate for consumer-filed claims. Figure 39, by contrast, shows the data from jurisdictions almost all of which limit or bar company use of small claims court. In these jurisdictions, our outer limit estimate for the number of consumer-filed credit card claims is larger than the number of company-filed claims.

FIGURE 38: INDIVIDUAL AND ISSUER USE OF SMALL CLAIMS COURT 2012 – PART 1 (SCALED FROM ZERO TO 14,000)

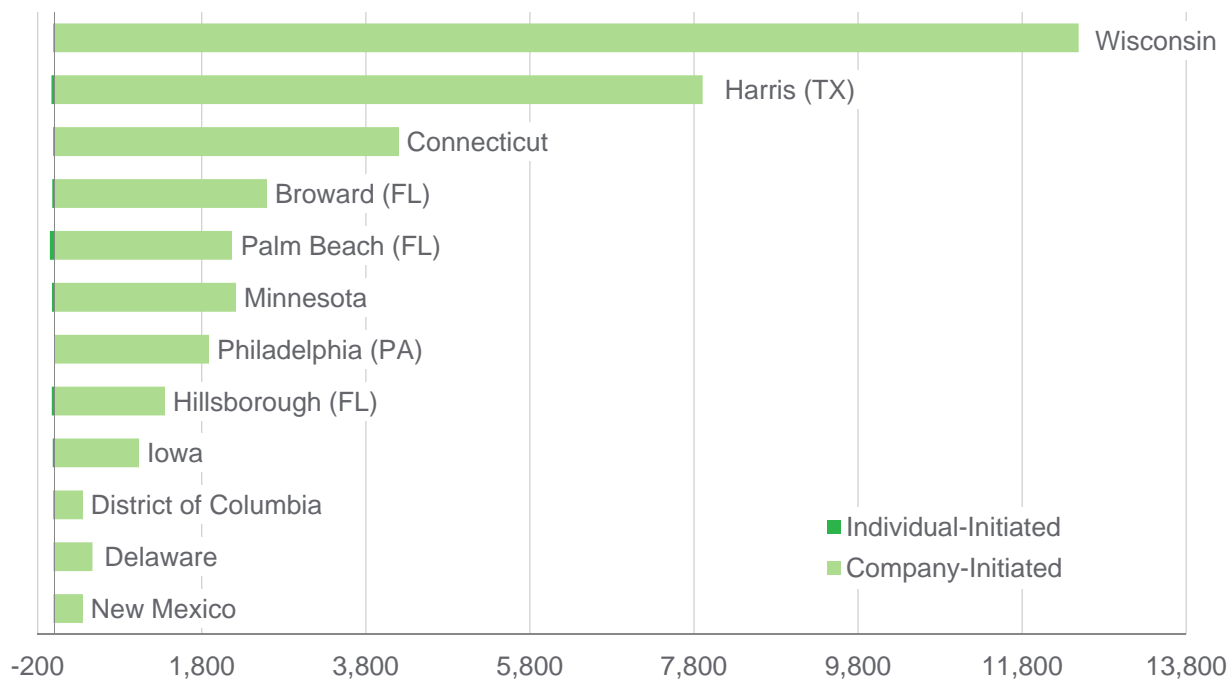
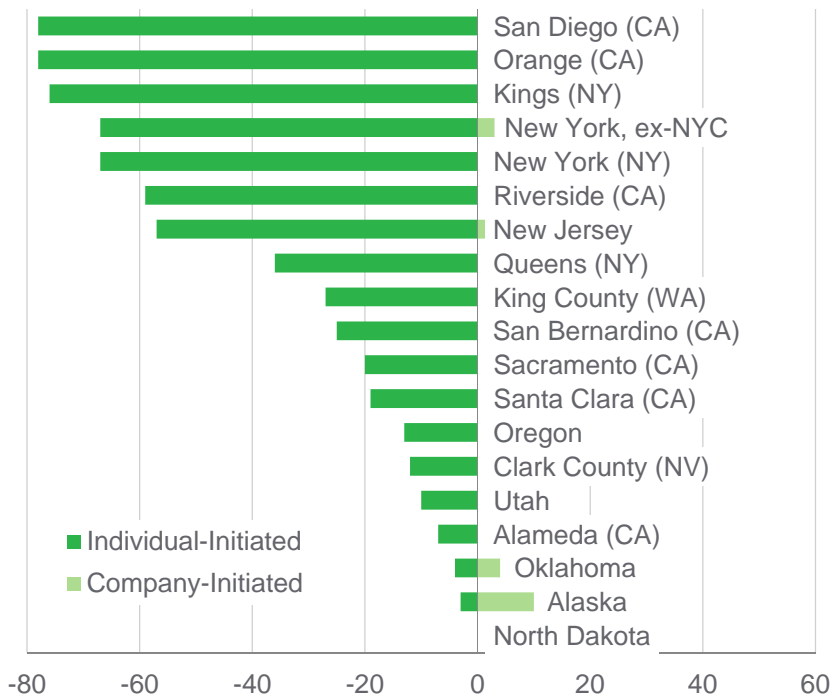


FIGURE 39: INDIVIDUAL AND ISSUER USE OF SMALL CLAIMS COURT 2012 – PART 2 (SCALED FROM ZERO TO 100)



METHODOLOGY

We searched two sources of data to determine the incidence of consumer financial disputes in small claims court: state databases and county databases.

State-level sample

We checked the online databases of the small claims courts of the 50 states and the District of Columbia. We included a state database as a source of data if it allowed us to do all of the following:

- Perform a keyword search by party name *or* permit easy identification of parties;
- Identify a party as a plaintiff, defendant, or third party (such as a trustee or garnishee);
- Capture *statewide* data, at least according the database. We excluded states for which we could tell that a number of counties were missing. The one exception was New York which we included because we were able to capture missing counties using our county-based sample;
- Conduct *statewide* keyword searches rather than county-by-county searches;
- Identify suits filed in 2012; and

- Run searches for free or for a reasonable cost (*i.e.*, less than \$1,000 per state).

The jurisdictions meeting the above criteria included Alaska, Connecticut, Delaware, the District of Columbia, Iowa, Minnesota, New Mexico, New Jersey, New York (excluding New York City), North Dakota, Oklahoma, Oregon, Utah, and Wisconsin. (The databases of the remaining 36 states did not meet one or more of the criteria above.) According to the 2010 Census data, our covered states had a combined population of 52,894,194, or about 17.1% of the total U.S. population of 308,745,538.³⁵² The states meeting our criteria were concentrated in the Midwest and Northeast.

County-level sample

To supplement our state-level sources, we checked the online small claims court databases of the 30 most populous counties.³⁵³ We included a county as a source of data if the relevant database permitted us to do the following:

- Perform a keyword search by party name or permit easy identification of parties;
- Identify a party as a plaintiff, defendant, or third party (such as a trustee or garnishee);
- Identify claims filed between January 1, 2012 and December 31, 2012; and
- Run searches for free or for a reasonable cost (*i.e.*, less than \$1,000 per state).

Thirteen counties met our criteria above: Harris (TX), Orange County (CA), Riverside (CA), San Diego (CA) San Bernardino (CA), Clark (NV), King (WA), Santa Clara (CA), Broward (FL), Philadelphia (PA), Sacramento (CA), Palm Beach (FL), and Hillsborough (FL). One county (Suffolk County, NY) met the criteria above but was excluded because it was already included in

³⁵² All population data retrieved from <http://www.census.gov>. New York state results exclude the population of the five boroughs of New York City.

³⁵³ These 30 counties in order of population were as follows: Los Angeles, CA (9,818,605); Cook County, IL (5,194,675); Harris County, TX (4,092,459); Maricopa County, AZ (3,817,117); San Diego County, CA (3,095,313); Orange County, CA (3,010,232); Miami-Dade County, FL (2,496,435); Kings County, NY (2,504,700); Dallas County, TX (2,368,139); Queens County, NY (2,230,722); Riverside County, CA (2,189,641); San Bernardino County, CA (2,035,210); Clark County, NV (1,951,269); King County, WA (1,931,249); Tarrant County, TX (1,809,034); Santa Clara, CA (1,781,642); Wayne County, MI (1,820,584); Broward County, FL (1,748,066); Bexar County, TX (1,714,773); New York County, NY (1,585,873); Philadelphia County, PA (1,526,006); Alameda County, CA (1,510,271); Middlesex County, MA (1,503,085); Suffolk County, NY (1,493,350); Sacramento County, CA (1,418,788); Bronx County, NY (1,385,108); Nassau County, NY (1,339,532); Palm Beach County, FL (1,320,134); Cuyahoga County, OH (1,280,122); and Hillsborough County, FL (1,229,226).

a state-level source (New York state). In addition to the online small claims court databases, we found county-level data from two other sources. First, we collected data in person from terminals in the small claims court clerk offices of New York, Queens and Kings Counties (the boroughs of Manhattan, Queens and Brooklyn). While not available online, these databases met all of the other county-level criteria. Second, Westlaw and Lexis’s Courtlink provided data for two counties not otherwise available online: Alameda and Riverside Counties (both CA).³⁵⁴

In all, these county-level sources added 17 jurisdictions to our dataset, or approximately 35,160,801 persons all from states (California, Florida, Nevada, Pennsylvania, Texas, and Washington) or locations (New York City) not already included in our set of state-level sources.

In total all our sources—state and county—together cover approximately 85 million people, and 20 states (including the District of Columbia), either in whole or in part.

In these 31 states and counties, the small claims jurisdictional limit (the maximum amount of money damages that a plaintiff may claim and still require a defendant to dispute in small claims court) ranged from \$3,000 to \$15,000, as shown below.

TABLE 11: SMALL CLAIMS JURISDICTIONAL MONEY DAMAGES LIMITS

State/County	Small Claims Jurisdictional Limit
Alaska	\$10,000
Connecticut	\$5,000
Delaware	\$15,000
District of Columbia	\$5,000
Iowa	\$5,000
Minnesota	\$10,000
New Jersey	\$3,000 (\$5,000 if demand is for return of deposit)

³⁵⁴ Other than these two counties, Westlaw and Lexis provided no unique additional jurisdictions that were not already present in our dataset; conversely, most of the jurisdictions in our dataset were not available on Westlaw and Lexis. (To the extent that Westlaw and Lexis offered data available independently online, our searches of Westlaw and Lexis either confirmed our results or showed that Westlaw and Lexis offered fewer results.)

New Mexico	\$10,000
New York (excluding NYC)	\$5,000 (additional jurisdictional limits for companies)
North Dakota	\$10,000
Oklahoma	\$7,500
Oregon	\$10,000
Utah	\$10,000
Wisconsin	\$10,000 for replevin, \$5,000 for tort, \$25,000 for consumer credit transaction (for return of personal property subject to a lease or credit from a dealer)
Alameda (CA)	\$10,000 (additional jurisdictional limits for companies)
Broward (FL)	\$5,000
Clark (NV)	\$7,500
Harris (TX)	\$10,000
Hillsborough (FL)	\$5,000
King (WA)	\$5,000
Kings (NY)	\$5,000 (additional jurisdictional limits for companies)
New York (NY)	\$5,000 (additional jurisdictional limits for companies)
Orange (CA)	\$10,000 (additional jurisdictional limits for companies)
Palm Beach (FL)	\$5,000
Philadelphia (PA)	\$12,000
Queens (NY)	\$5,000 (additional jurisdictional limits for companies)
Riverside (CA)	\$10,000 (additional jurisdictional limits for companies)
Sacramento (CA)	\$10,000 (additional jurisdictional limits for companies)
San Bernardino (CA)	\$10,000 (additional jurisdictional limits for companies)
San Diego (CA)	\$10,000 (additional jurisdictional limits for companies)
Santa Clara (CA)	\$10,000 (additional jurisdictional limits for companies)

Institutions

Our search for disputes in small claims court involving consumer financial products focused on credit card issuers. The industry is concentrated, so searches for relatively few issuers cover most of the market.³⁵⁵ To come up with our list, we started with the list of the largest issuers with pre-dispute arbitration clauses in their agreements at year-end 2012.³⁵⁶ We ranked the top 15 by consolidated volume of credit card loans outstanding at year end 2012, based on call report data, as reported by SNL.³⁵⁷ This is shown below.

TABLE 12: SUMMARY OF LARGE ISSUERS BY SMALL CLAIMS COURT ARBITRATION CARVE-OUT STATUS

Credit Card Issuer	2012 Loans Outstanding (\$ 000s)	Small Claims Court Carve-Out?
1. Citibank	107,126,000	Yes – Mutual
2. American Express	56,714,000	Yes – Consumer only
3. Discover	50,927,790	Yes – Consumer only
4. GE	26,349,553	Yes – Mutual
5. Wells Fargo	24,651,342	Yes – Mutual
6. U.S. Bank	17,120,000	Yes – Mutual
7. USAA	15,879,574	Yes – Mutual
8. Barclays	14,281,456	Yes – Mutual
9. Comenity	7,245,336	Yes – Consumer only

³⁵⁵ The credit card market is concentrated; the 10 credit card issuers we selected make up an overwhelming share of the market, as measured by outstandings. *See supra* note 310.

³⁵⁶ *See* section 3, *supra*.

³⁵⁷ We adjusted two loans outstanding figures where SNL’s automated data via Excel appeared to be inconsistent with our independent check of the regulatory filings.

10. First National Bank of Omaha	4,229,188	Yes – Claims < \$25,000
11. Fifth Third	2,085,601	No
12. BB&T	1,744,138	Yes – Consumer Only
13. Merrick	1,323,392	Yes – Consumer Only
14. Regions	899,929	Yes – Mutual
15. KeyBank	729,151	Yes – Mutual

We first selected the top four issuers from this list that had “mutual” small claims court carve-outs. Excluding GE, this gave us Citibank, Wells Fargo, U.S. Bank, and USAA. We excluded GE because its credit card business is exclusively private label, meaning that it issues no GE cards, only cards for other businesses.³⁵⁸ We then added American Express and Discover, as the largest issuers with non-mutual small claims court carve-outs (meaning that consumers may require the resolution of a dispute in small claims court, but the issuer may not do so), and Fifth Third, as the largest issuer with an arbitration provision with no small claims court carve-out. The resulting issuers are shown in bold above.

As a further comparison, we selected the largest issuers with no arbitration clauses at all. The top three issuers with no arbitration clause, by consolidated credit card loans outstanding at year end 2012, were (in order) Chase (\$117.6 billion), Bank of America (\$94.8 billion), and Capital One (\$77.8 billion).³⁵⁹ Altogether, the 10 issuers we selected had nearly \$564.8 billion in credit card loans outstanding at year end 2012.

³⁵⁸ With private label credit cards, the actual credit card issuer may not be named on the card or in materials the account holder might see, such as the credit card agreement, or the monthly credit card statements. As a result, such an account holder might only know to file against the merchant listed on the credit card rather than the actual issuer. Given the lengthy list of companies issuing cards through GE, a search for consumer-initiated claims against GE likely would have been difficult, time consuming and still potentially inaccurate.

³⁵⁹ We adjusted one figure reported by SNL. As to Bank of America, the SNL reported number included foreign credit card loans. We added the domestic FIA Card Services, National Association credit card loans (94,832,485,000) to the

Searching for cases

To search the 31 databases meeting our criteria, we formulated search terms to find disputes in small claims courts initiated by individuals against credit card issuers (“consumer-filed cases”) and by issuers against individuals (“issuer-filed cases”).

To develop search terms for the consumer-filed cases, we started with the names of the parent companies for our sample of issuers. We added all their subsidiaries included in the credit card agreement database or reported by SNL as holding credit card loans as of year-end 2012. The resulting list of names is in column 2 of Table 13 below. From this list, we developed search terms. We selected the minimum number of common words or phrases that would still capture every legal entity related to the 10 issuers we identified (*e.g.*, “American Express” was intended to capture both “American Express Centurion Bank” and “American Express Travel Related Services, Inc.”; “Citi” was intended to capture “Citibank, National Association” and “Citigroup, Inc.”).

We added other terms likely to be used by consumers as plaintiffs, based on the assumption that consumers (or the court employees entering case information in small claims court databases) may not always list the correct credit card-issuing legal entity in their suits. They may erroneously list, instead, the corporate parent (“American Express Co.”), a truncated and informal version of the name (“American Express” or “AmEx”), alternate spellings (*e.g.*, “Capitol One” for “Capital One”), or spacings (“J. P. Morgan” rather than the now-official “JPMorgan”). They may also use trade names that would not be found in a search for the main entity (*e.g.*, “BankAmericard”).

The full list of search terms is below in Columns 3 and 4.

domestic Bank of America, National Association credit card loans (2,822,000). After the top three issuers, the next three issuers without arbitration clauses had significantly smaller volumes of loans outstanding: Navy Federal Credit Union (\$6.777 billion), PNC Bank, National Association (\$3.821 billion), and World’s Foremost Bank (\$3.852 billion).

TABLE 13: CREDIT CARD ISSUING ENTITIES AND SEARCH TERMS

Corporate Parent	Subsidiary holding credit card loans as of YE 2012 per SNL	Search Term Based on Issuing Entities + Parents	Other Terms (Abbreviation, Misspellings, Trade Names)
American Express Co.	American Express Bank, FSB American Express Centurion Bank American Express Travel Related Services Company, Inc. American Express Credit Corporation	"American Express"	"AmEx" "Am Ex"
Citigroup, Inc.*	Banamex USA Citibank, National Association	"Banamex" "Citibank" "Citicorp" "Citigroup"	"Citi"
Discover Financial Services	Discover Bank	"Discover"	N/A
Fifth Third Bancorp	Fifth Third Bank	"Fifth Third"	"Fifth 3rd" "5th Third" "5th 3rd" "5/3rd"
U.S. Bancorp	U.S. Bank National Association Elan Financial Services	"U.S. Bancorp" "U.S. Bank" "Elan"	"US Bancorp" "US Bank" "U S Bancorp" "U S Bank" "U. S. Bancorp" "U. S. Bank"
USAA Insurance Group	USAA Federal Savings Bank USAA Savings Bank	"United Services" "USAA"	n/a
Wells Fargo & Co.	Wells Fargo Bank Northwest, National Association Wells Fargo Bank, National Association Wells Fargo Financial National Bank	"Wells Fargo"	"WellsFargo"
JPMorgan Chase & Co.	JPMorgan Chase Bank, National Association Chase Bank USA, National Association	"JPMorgan" "Chase"	"JP Morgan" "J P Morgan" "J.P.Morgan" "J.P. Morgan" "J. P. Morgan"
Bank of America Corp.	Bank of America, National Association FIA Card Services, National Association	"Bank of America" "FIA"	"BoA" "BofA" "BankAmericard"

Capital One Financial Corporation	Capital One, National Association Capital One Bank (USA), National Association	"Capital One"	"Capital 1" "Cap One" "Cap 1" "Capitol One"
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***Note:** Department Stores National Bank is a subsidiary of Citigroup, Inc. that reported some credit card loans on its balance sheet. It has no arbitration clause and, as such, it was excluded from Citibank’s loan volume and search terms.

Once we identified cases that named entities responsive to these search terms, we eliminated duplicate entries because different search terms sometimes retrieved the same case. We also removed cases in which the responsive entity was not the defendant (*e.g.*, a garnishee) because in such cases the issuer is not involved in a dispute with a consumer. We culled cases in which the responsive entity was by its name alone identifiably *not* a credit card or checking-related subsidiary. (For instance, we cut results in which “mortgage,” “home loan,” “insurance,” “casualty,” “auto,” “investment,” or “securities” appeared in the entity name.) Finally, we also removed cases in which the filing party was not a natural person.

For issuer-filed cases, we included only disputes in which the named plaintiff was one of the legal entities issuing credit cards identified in Table 13. In other words, we used column 2 for our search, not columns 3 and 4. In most jurisdictions we could not tell from available documents if a credit card was involved in the dispute. We assumed that companies would file credit card-related disputes only in the name of credit card-issuing legal entities and not in the name of other subsidiaries, including the parent company. Finally, we removed cases in which the party being sued was not a natural person.

Consumer Checking Account Volume

The search terms used for consumer-filed cases will also identify a number of cases against large retail banks within the same corporate families. Many of the issuers covered by our sample also offer checking account and other retail banking products. In addition, our operative search terms for credit card issuer will identify other subsidiaries in the same corporate family that do not issue credit cards, but do offer checking account and other retail banking products. As a result, we should expect our outer limit estimate for credit card consumer-filed cases to include a significant share of any checking account and other retail banking product cases filed in these small claims courts.

APPENDIX F

Defined terms

We set out below a number of defined terms as used in this presentation:

DEFINED TERM	
AAA	American Arbitration Association, an arbitration administrator
AAA DATA	Electronic case records provided voluntarily by the AAA to the Bureau for all AAA-administered consumer arbitration filings since 2010
AAA CASE DATA	A subset of AAA Data pertaining only to credit card, checking account, or payday loan disputes for 2010, 2011 and 2012
ADMINISTRATIVE FEES	Administrative fees payable to an arbitration administrator
ARBITRATION CLAUSE	A provision in a consumer contract that provides for binding arbitrated resolution of claims that arise between the parties
ARBITRATOR FEES	Fees payable to an arbitrator to resolve claims that arise between the parties
BUREAU	Consumer Financial Protection Bureau
CLASS ACTION	A form of litigation in which a party seeks to or does represent a “class” of similarly-situated parties
CONSUMER DUE PROCESS PROTOCOL	AAA-adopted principles directed to the fairness of consumer arbitrations
COMPANY-FILED ARBITRATION	Arbitration recorded on AAA claim form as being filed by a company against a consumer
CONSUMER-FILED ARBITRATION	Arbitration recorded on AAA claim form as being filed by a consumer against a company

DEBT COLLECTION ARBITRATION	Company-filed arbitration seeking debt, or consumer-filed or mutually submitted arbitration made after court collection proceedings; see Section 4.2.2 for more details
FAA	Federal Arbitration Act, 9 U.S.C. §§ 1-16
FLESCH READABILITY SCORE	Readability tests designed to indicate the difficulty of comprehension of text. The tests are a widely used standard in plain language analysis. Scores range from 0.0 to 100.0, with a higher number indicating greater readability.
FLESCH-KINCAID GRADE LEVEL	Measure that translates readability of a text into the grade level required to understand the text. A lower grade level indicates greater readability.
FORMAL DISPUTE RESOLUTION	Litigation or arbitration mechanism that can effect binding resolution of a dispute
GPR PREPAID CARD	General purpose reloadable prepaid card
INITIAL FEES	Administrative and arbitrator fees assessed at the beginning of a consumer arbitration
JAMS	JAMS, Inc. (formerly known as Judicial Arbitration and Mediation Services), an arbitration administrator
MUTUALLY SUBMITTED ARBITRATION	Arbitration recorded on claim form as being submitted by both parties
NAF	National Arbitration Forum, previously a significant consumer arbitration administrator
PRIVATE LABEL CREDIT CARD	Credit card issued and/or managed by a financial institution on behalf of a merchant or a wholesale manufacturer for use only in that merchant establishment.
SUPPLEMENTARY PROCEDURES	AAA rules applicable to consumer arbitration